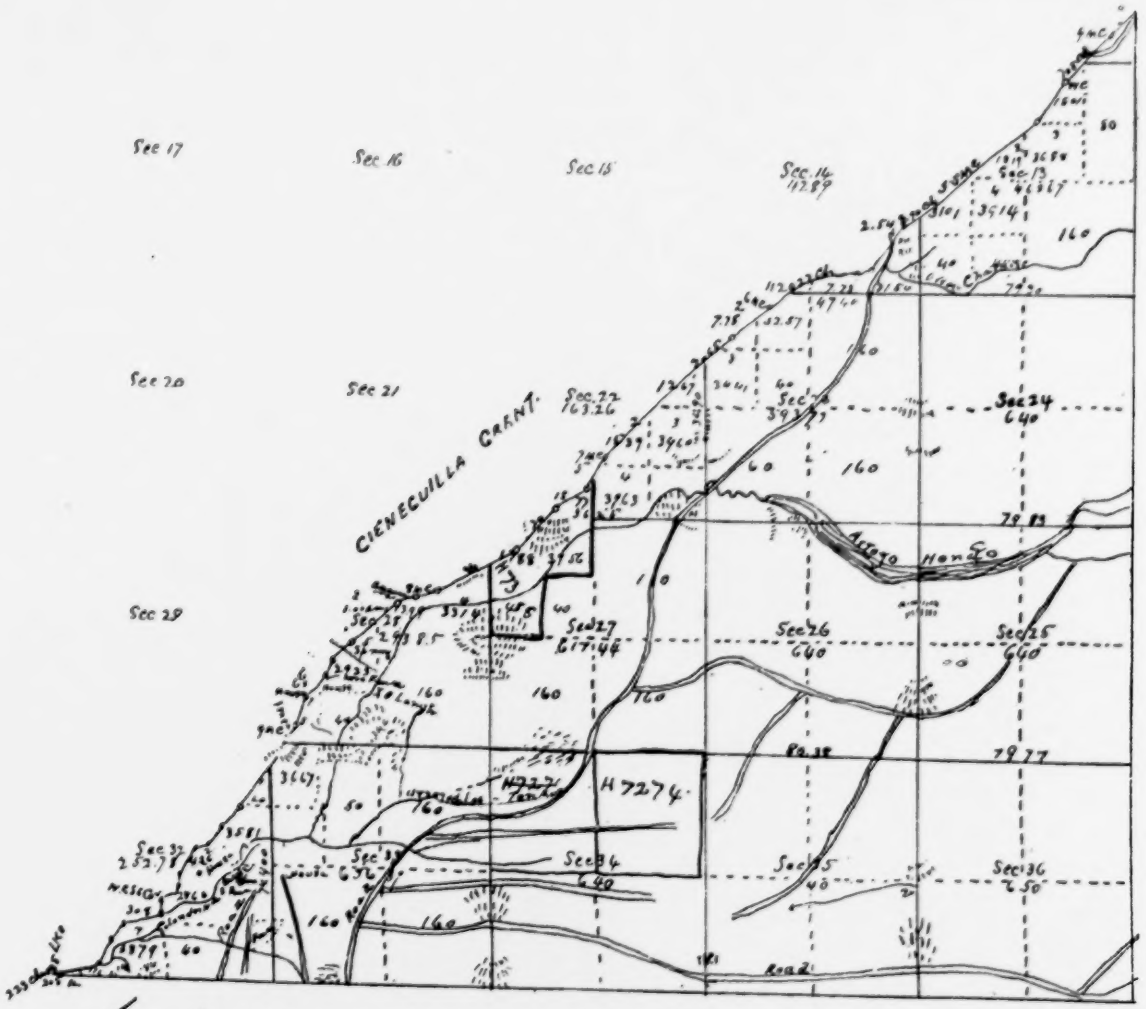


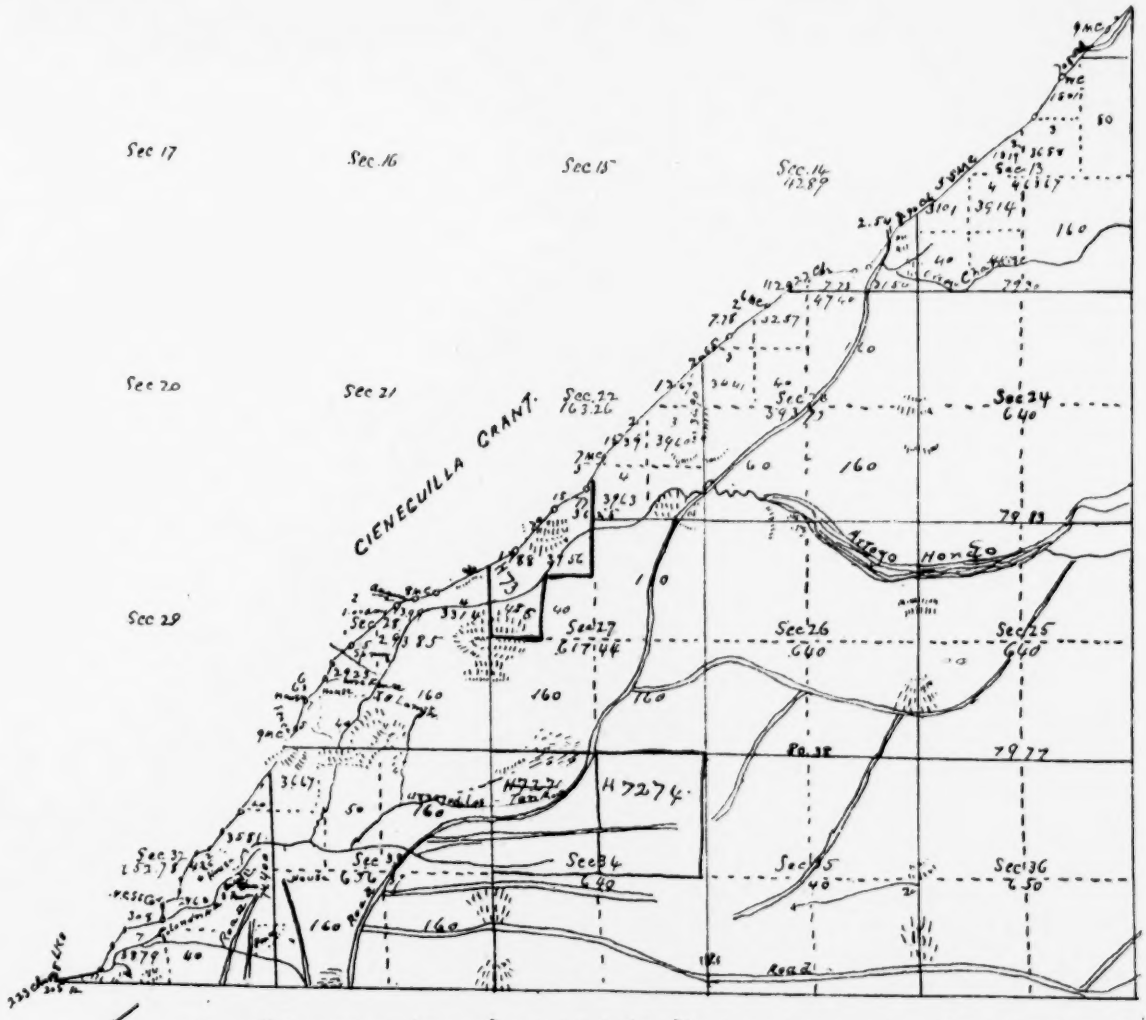
This is to certify that the above plat is a true and correct copy of the official plat of Trac. Township No. 16 North Range No. 8 East of the New Mexico Principal Meridian on file in this office.

Santa Fe, N.M.
aug. 22, 1906.

Manuel R. Otero
Register.

No. 43.
Sena
Duquerie
&
Co.

p. 122



This is to certify that the above plat is a true and correct copy of the official plat of Trac. Township No. 16 North Range No. 8 East of the New Mexico Principal Meridian on file in this office.

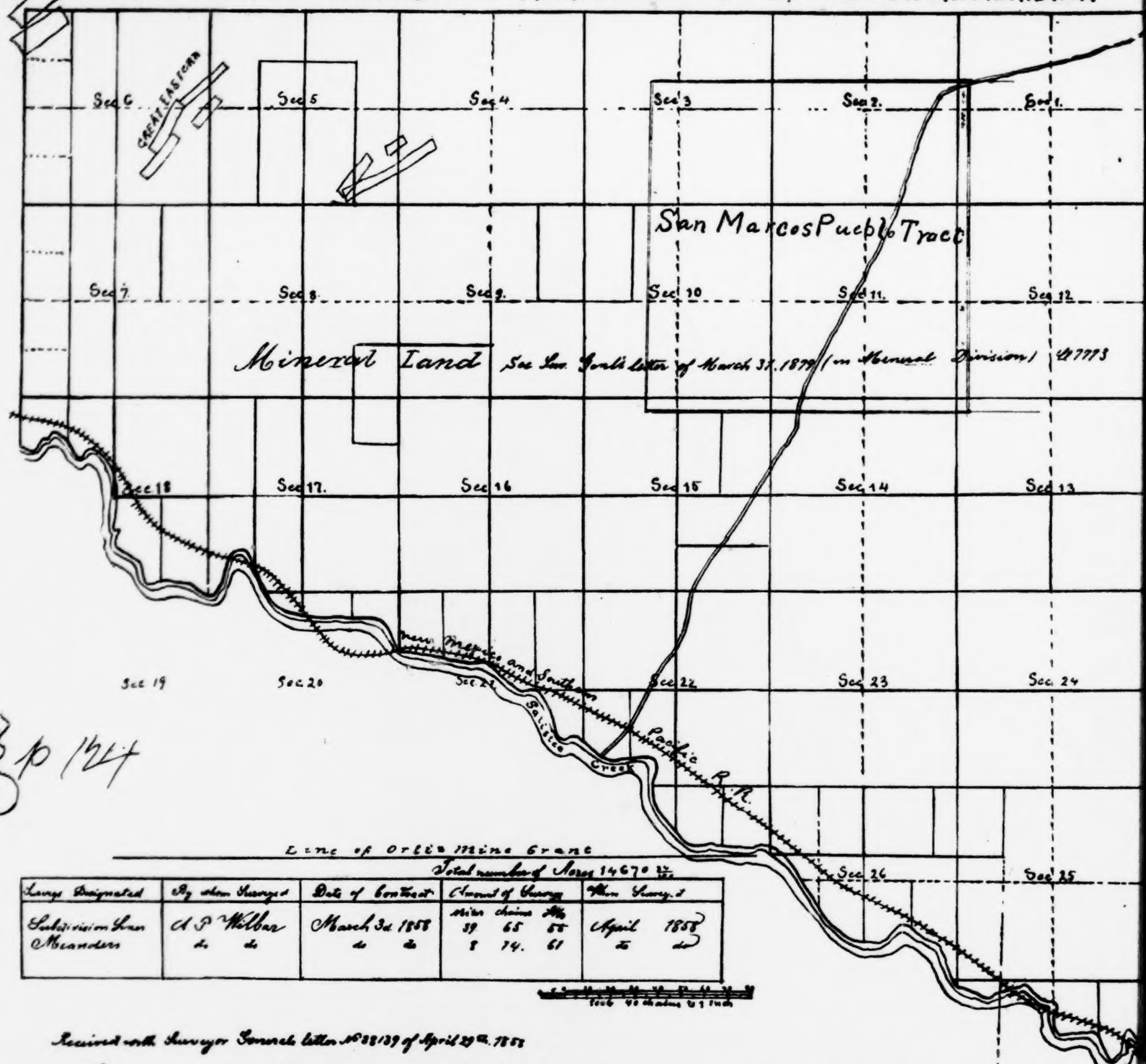
Santa Fe, N. Mex.
Aug. 22, 1906.

Manuel R. Otero
Register.

No. 43
Serie N
Parquisa Co
p. 123

Rec'd with S.G. letter of Apl 29th 1858

FRACTIONAL TOWNSHIP Nº 14 N. RANGE Nº 8 E OF PRINCIPAL MERIDIAN



No 73.
Iena
Turquoise Co. } p 124

Total number of Acres 14670 $\frac{27}{100}$

Lines Designated	By whom Surveyed	Date of Contract	Amount of Survey: Miles	Chains	Lks	When Surveyed
Subdivision Lines	A. P. Wilbar	March 3d 1858	39	65	58	April 1858
Meanders	do do	do do	8	74.	61	do do

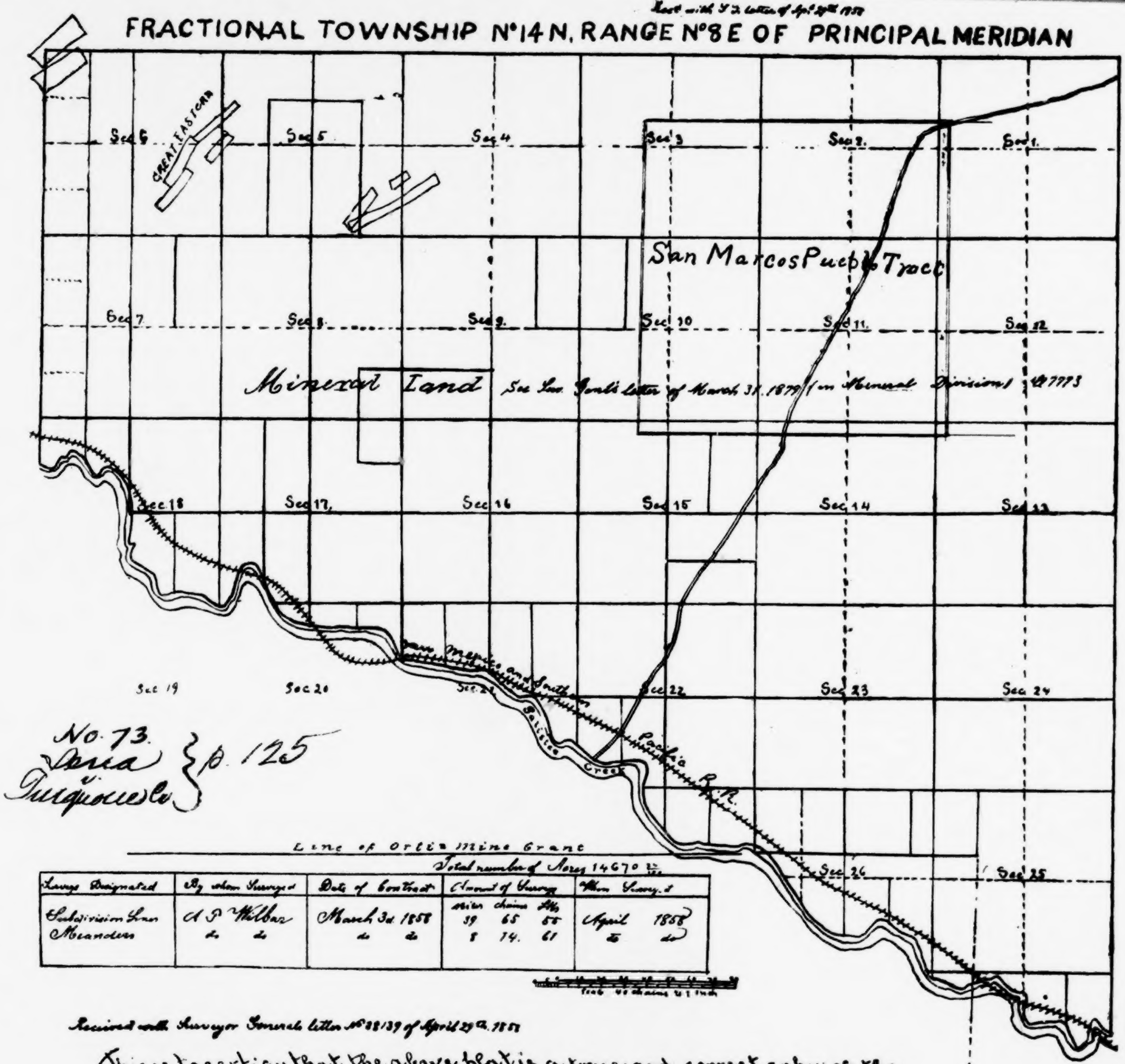
Received with Surveyor Generals letter Nº 38/39 of April 29th 1858

This is to certify that the above plat is a true and correct copy of the official plat of Frac. Township No 14 N. Range No 8 E of the principal meridian, N.M. on file in this office.

Santa Fe, N.M.
Aug. 22. 1906.

Manuel R. Otero
Register.

FRACTIONAL TOWNSHIP No 14 N. RANGE No 8 E OF PRINCIPAL MERIDIAN



No. 73.
p. 125

Total number of Acres 14670

Lines Designated	By whom Surveyed	Date of Contract	Amount of Survey	When Surveyed
Subdivision Lines	A. P. Wilbar	March 3d 1858	miles 39, chains 65, links 55	April 1858
Meanders	do do	do do	8, 14., 61	do do

Received with Surveyor Generals letter No 38139 of April 29th 1858

This is to certify that the above plat is a true and correct copy of the official plat of Frac. Township No 14 N. Range No 8 E of the principal meridian, N.M. on file in this office.

Santa Fe, N.M.
Aug. 22, 1906.

Manuel R. Otero
Register.

the court that the Cieneguilla grant which appears on that plat to the northeast of it, is not extended over it, because it is a private land claim.

Marked Defendant's Exhibit No. 59.

Mr. CLANCY: I think we desire to further object to this plat of Township 15 north, Range 8 east, for the reason that it does not correctly show the survey of the Cerrillos grant, except with an additional pencil line inside of the original survey.

Mr. REYNOLDS: I am not offering it to show anything about the present location or condition of the Cerrillos grant. It is offered for the purpose of showing the location of all claims that were known, and the manner in which they were asserted in the office of the surveyor general and government of the United States under the act of 1854—regulations promulgated by the secretary of the interior.

Mr. REYNOLDS: I also offer in evidence plat of fractional Township No. 14 north, Range 8 east, showing the northern part of that township, immediately south of Township 15 north in the same range.

Marked Defendant's Exhibit No. 60.

Mr. REYNOLDS: Now I desire to locate the records of the homestead entries.

Mr. CLANCY: Give us the names of the claimants and the map and we will admit the location of the homestead entries. We will agree to that.

Mr. REYNOLDS to Witness MULLER: I wish you would send down all the homestead locations, to show the dates of the location of the property down there, that falls within the claimed out-boundaries.

(Here follow maps marked pp. 120, 121, 122, 123, 124 & 125.)

127 EDWARD F. BENNETT, sworn.

Direct examination by Mr. M. G. REYNOLDS:

Q. State your full name?
A. Edward F. Bennett.
Q. Where do you reside?
A. Cerrillos.
Q. How old are you?
A. Sixty-two.
Q. How long have you been in New Mexico?
A. The past 26 years.
Q. What has been your business?
A. Prospecting and mining.
Q. Is that your business now?
A. Yes, sir, mainly.
Q. Are you acquainted with the country down in what is known as the Cerrillos Mining District, and particularly in and around what is called the Turquoise mines?
A. Yes, sir.
Q. How long have you known that country?
A. Twenty-six years.
Q. Have you had occasion to go over it much?
A. As a prospector, yes.
Q. Are you familiar with the topography of it?
A. Yes, somewhat.
Q. State whether or not you have prospected practically all over it?
A. Yes, nearly all over the district.
Q. Do you know where what is called the Cerro Pelado, or Turquoise Peak is situated?
A. I know where the peak is located. I am not acquainted with the Mexican names.
Q. Do you speak Spanish?
A. Very little.
Q. Read and write it?
A. No, sir.
Q. Speak Spanish well enough to get along with the people in that country?
A. I have for a good many years; yes, sir.
Q. I will get you to state whether or not in the course of your prospecting over that country, you ever located or worked upon any of those mines, situate in and around the present location of the Turquoise mines or property in suit here?
A. Yes, sir.
128 Q. When?

Mr. CLANCY: I reserve the right to strike out without making objections as we go along, because I do not think it is material or competent evidence.

A. I think the first of my work was sometime about 1886 in the claim adjoining the Castillian, named then, the Judge Scribner. I

worked later in the Muniz mine, and that is all I worked in that district. Further south in the district there are more turquoise properties, that I worked in.

Q. In the course of your prospecting did you ever locate any mines of your own or attempt to locate any property?

A. Yes, sir.

Q. What did you do with reference to determining the question of whether or not the property was open for location and whether or not there was any claims asserted to property so as to prevent the proper location of mining claims?

A. When I first went into the district, I heard there were some patented lands down there, and some of public domain, so I got plats or tracings from the plats made in the surveyor general's office, and perhaps in the land office, to keep from interfering with prior rights in my prospecting on the public domain, and that is how I kept clear as much as possible.

Q. Where did you apply and to whom?

A. I went to the surveyor general's office, to the chief clerk, and requested a plat of that part of township Nos. 14 and 15, including the Cerrillos hills, where there were prospects so I would know where there were patented lands, entered lands and grants, and prospects that showed on the public domain.

Q. What year was that?

A. That was in 1879.

Q. Did you get such a plat?

A. Yes, sir.

Q. From whom did you get it?

A. Through David J. Miller, one of his clerks named Wm. Tipton made the plat.

Q. Have you got that plat now?

A. Yes, sir.

Q. Will you produce it?

A. Yes, sir. (Witness here took large pocket-book from pocket and out of that produced the plat.)

Q. What district or country does that represent?

129 A. It represents Townships 14 and 15 north, including the Cerrillos Hills, where I proposed to prospect.

Mr. CLANCY: We object—the plat speaks for itself.

Mr. REYNOLDS: Do you know a spring in the country called the Coyote Spring?

A. Yes, sir.

Q. Do you know within what section it is located?

A. I cannot remember the sections. I have been there.

Q. What is the nature of the country around that spring?

A. Slightly hilly.

Q. Describe the appearance of that spring as you saw it, and as you have known it from time to time, and the topography of the country immediately around it?

A. Well there is something like a gulch or arroyo there, and the water gets down to bed rock, which is sandstone, and in some of

the fissures the water seeps out of them, and that is what I know by the Coyote Spring. It is frequented by cattle and sheep owners.

Q. Do you know the names with which the locality the arroyo on which it is located is called?

A. Well—below there, there is an outlet into the San Marcos arroyo—it is rather a canyon, a precipitous wall—in places there the water seeps out, and runs down into a little valley—the valley of San Marcos. There used to be water works there for the town of Cerrillos, and there is now I believe.

Q. What is the arroyo called?

A. Coyote Canyon or Coyote arroyo.

Q. Have you been quite familiar with the names of objects in that country from time to time as you have heard them from those who have been there long before?

A. Why, yes, from the Mexicans. There are several arroyos there. I can't remember all of them.

Q. I mean either north or south of this Coyote Spring?

A. Yes, sir.

Q. I will ask you to state whether or not you know or have ever heard in that vicinity from anybody, at any time, of such an arroyo as the Arroyo del Oregano?

A. I never heard of such a one.

Q. Have you ever heard of such an arroyo in and around that spring, east or west or north or south of it—as the Cuesta del Oregano, or the Cuesta of the Arroya del Oregano?

A. I never heard of it.

130 Q. I will ask you to state if in the course of your prospecting in that immediate country, whether or not you were attempting to keep off of the claims, and keep off the boundaries of land grants?

A. That was my purpose, and that is the reason I had the plats made so as not to interfere with any prior rights in my prospecting.

Q. In the course of that time did you ever hear of a grant of land in that country, or in that locality, west and south and north or east, *or east,* south and north of the Cerrillos grant, called the Jose Leyba grant?

A. I never heard of that grant until recently.

Q. How did you happen to hear of it recently?

A. By hearsay—in reading the proceedings of the land court.

Q. Was that after the claim was made by Mr. Sena to this property that you heard it

A. Yes, sir.

Q. Did you make any inquiries at the surveyor general's office at the time you obtained the plat, and also at other times in making your locations or prospecting in that country, as to whether or not it was covered with any other grants than the one you have on this plat?

A. I made no special inquiry. I requested a plat that would show all prior rights there, so I would make no interference whatever with any one's rights in that country. They put down the

Juana Lopez grant, the Cerrillos grant, etc. I had no other tracings made in 1880.

Q. Did you ever work on the Castillian mine?

A. Very little.

Q. When did you first work on it?

A. I think in 1889.

Q. Who was the claimant of it at that time?

A. A man named Parmalee.

Q. How long did you work for him?

A. I did not work for him, I worked for another man who had a lease there taking out turquoise.

Q. Do you know who has been in possession of that property since?

A. J. P. McNulty, superintendent of the American Turquoise Company.

Q. How long has he been there, if you know?

131 A. Since 1892 or 1893, I forget the exact date.

Q. Prior to 1892 do you remember who was in possession of the Castillian mine?

A. Yes, Mr. Parmalee was in possession of that Castillian mine at one time. Prior to that a man named Marshall worked there in the year 1879 and 1880—he worked there cleaning out a lot of waste rock and got down to the old diggings, and afterwards Parmalee came there. I don't know whether he made a location or bought out Marshall.

Q. That is what is known as the Castillian or Parmalee mine?

A. Yes, the old Castillian mine.

Q. That is a part of the group of the American Turquoise Company there now?

A. Yes, sir.

Q. I will ask you to state whether or not you ever worked on or knew anything about, or if you were the owner of the Muniz mine?

A. I located the Muniz mine once myself and abandoned it.

Q. When was that?

A. I think in 1889. I never recorded it. Later it was relocated by myself and John Andrews. Later the Muniz's came and located and worked it.

Q. Do you remember about when they located it?

A. I can't say positively.

Q. Were the Muniz's in possession of it?

A. They were, before the American Turquoise Company.

Q. At the time they located it, were you with them and taking any part in the location?

A. No, sir, I was working close by and saw them.

Q. Did you take any part as a witness in any of the group of mines, either the Castillian, Morning Star, Sky Blue, Gem, or Muniz?

A. I was a witness to the relocation of the Castillian in January, 1885, but it was not recorded. It was located by E. G. Boyce for Parmalee, who lived here in Santa Fe.

Q. Well, was it then relocated?
A. Yes, it was relocated afterwards.
Q. How long has J. P. McNulty been there in charge of that property continuously, to your knowledge?
A. I think since 1893, it might have been 1892.
132 Q. When did you first know Mr. McNulty?
A. I knew McNulty in 1886, but he was not in there then.
Q. Do you know where the land of Tom Whelan in that country is located, in what section?
A. I know the location. I don't know as I can give the section exactly. I had a ranch a little west from there myself.
Q. Do you know whether or not this Coyote Spring as it is called, is on what is now a homestead of anybody down there?
A. I don't know that it is now, but it was on land that was filed on.
Q. Filed on by whom?

Objected to by Mr. Clancy, as not the best evidence and incompetent.
Objection sustained.

Q. Do you know who claims the land aside from Mariano Sena, where the Coyote Spring is located?
A. I don't know who does now. There was a claim made there by Albert Guyer.
Q. Do you know what kind of a claim it was?
A. I think it was a homestead.
Q. Do you know how far the southeast corner of the Cerrillos Grant, as it was understood by you, and the information you obtained from your plat, and on the ground—how far it was from the turquoise mines—the southeast corner?
A. I would think it was about 1-8th of a mile.
Q. Do you know what section that was in?
A. I don't remember. It is possible it would be in Section 21.
Q. In the course of your prospecting in that country did you ever hear of and did you ever make or did anybody produce to you, or did you ever hear of it in any way, the claim of a grant to Jose Leyba, or any other Leyba, to the land lying east and south, and within now Sections 21, 28, 29, 30, 31, 32, 33 and 34?
A. No, sir.
Q. Were you over that country?
A. Yes, sir. I think so.

The COURT:

Q. Was there any ruins at that Coyote Springs of any house?
A. No, sir. I never saw any.

Mr. REYNOLDS:

Q. How often were you around those springs?
133 A. Not very often, for it is outside of where I was prospecting.
Q. Are there any ruins of any corrals or houses, and if so, what do you know about that?

A. There was a kind of a dug-out made there in the side of the bank in the clay, and I helped to put up a cabin for the Guyer's ranch. I did not see any ruins. I did not go over the tract though.

Q. In those years, at the Coyote Springs, did you see any ruins of an adobe house or wall, three and a half to five feet high?

A. No, sir.

Q. Is there any such thing around there now?

A. Nothing, except those of San Marcos, a mile below there.

Q. San Marcos is in Township 14, is it not?

A. Yes, sir.

Q. How long do you say you have been in and around the Coyote Spring?

A. Ever since 1886, but most of my prospecting is further west in the hills, so I am not frequently there, but I have been there several times.

Q. Are there or are there not in and around Coyote Springs any evidence of ancient habitations, such as houses?

A. I did not see any.

Q. Do you know J. M. Allen?

A. Yes, I was slightly acquainted with him.

Q. Do you know whether or not he was in that community and whether or not he located what is now called the Morning Star mine?

A. I don't know about that location.

Q. Did you know C. G. Storey?

A. Yes, sir.

Q. Did you see him there

A. Yes, sir.

Q. Do you know whether he was in possession of any of that property or not?

A. Yes, sir. The Muniz and the Castillian.

Q. Do you know whether he located any of it or not?

A. I could not say as to that.

Q. When did you see him in possession of the property down there?

A. In 1888 and 1889, to 1893, I think.

134 Q. Was he in possession when McNulty came there?

A. Yes, I think he was.

Q. Do you know anything about the Muniz's? About Pedro and Faustin Muniz being there?

A. Yes, I knew of them being there. I was not well acquainted with them though.

Q. Well, you are well acquainted with them now are you not—with Pedro?

A. Yes, and there is an old gentleman—the father of them, who is dead. I knew him.

Q. Give me the names of the people, as you remember them, who were in possession of that property, these mines—the Gem, Morning Star, Sky Blue, Castillian and Muniz—prior to the time McNulty came there and took possession of them.

A. C. G. Storey was the next before McNulty, and he told me that——

Objected to by Mr. Clancy.
Sustained.

Q. Do you know who was in possession of the property, or any one of them, separately or together, before Storey?

A. Yes, sir the Parmalees were in possession of the Castillian and the ground where the Muniz is there was a man named Callander there in the early eighties.

Q. Who came there after Callander?

A. There was Marshall who had the Castillian first before Parmalee.

Q. What I am after is to get you to state to the court, if you can, who was in possession of any one of these pieces of property covering all five of them, if you know, running back from Storey, as far back as you know, independent of how they claimed them, or what they were doing?

A. Well these were separate claimants I spoke of and they were prior to Storey.

Q. Do you know how long that property in that vicinity had been worked for turquoise before these locations were made in the years 1890, 1891 and 1892?

A. Some of the first locations were made I think in the winter of 1880.

Q. Was that property down in that country known as or understood to be valuable for turquoise?

A. Not until some time later.

134½ Q. Was it being prospected for it or for any other mineral that you might have found, very actively?

A. There was other minerals prospected for close by the turquoise mines.

Q. Do you know whether or not J. P. McNulty since he has been in charge of that property—what kind of possession has he had? Has anybody else been there?

A. Why—it is my understanding he is superintendent for the American Turquoise Company.

Q. From the time he first came there, has there anybody else ever been in possession of that property that you know of?

A. No, sir.

Q. And that was in 1892 or 1893 you say?

A. Yes, sir, in 1892 or 1893.

Cross-examination by Mr. F. W. Clancy:

Q. Do you know an arroyo out there called the Arroyo de la Piedra? Did you ever hear of an arroyo of that name?

A. I can't remember it.

Q. Did you ever hear of an arroyo in that vicinity called the Arroyo de las Gallinas?

A. Yes, sir.

Q. Where is that situated with reference to this Coyote Spring?

A. I think it is a little west of it.

Q. That is it is a little farther down the Cienega in which the spring it situated, and joins that arroyo does it not? The Arroyo de las Gallinas comes down and connects with the arroyo in which the spring is?

A. This arroyo you speak of comes out on the plains, flowing westward and south, I don't remember whether it joins any other arroyo, but it probably flows into the San Marcos arroyo.

Q. Well now, did you ever hear that where that arroyo and the one in which the Coyote Spring is situated, that from the place where they join down, it was called the Arroyo de la Piedra?

A. I can't remember that.

Q. Now at the place where the spring is in the arroyo on the right hand side coming down the arroyo, there is quite a little hill just opposite the spring?

A. Yes, there is a slight hill—rising ground.

Q. A matter of 20 or 25 feet above the arroyo?

135 A. Yes, there is, on both sides.

Q. Now on the right hand side it rises rather abruptly for a short distance, and then comes back pretty near level?

A. I think there are gulches like and a gradual rise onto the plains coming down from the northwest.

Q. On that eminence or hill, on that side, did you ever make any examination there to see whether there were any indications of former houses there?

A. There is a trail coming along in there perhaps 200 feet from the spring. I put up a cabin there. I don't remember seeing any ruins there.

Q. You never made any search for them?

A. Not specially; no, sir.

Q. Now, on the other side of the arroyo, towards the San Marcos, the ground rises gradually for quite a long distance, two or three hundred yards, and perhaps more?

A. Yes.

Q. A sort of a slope?

A. Yes, sir; towards the arroyo.

Q. And here and there a little arroyo coming down into the larger arroyo, but there is a gentle rise towards the southward, towards San Marcos?

A. Yes, sir.

Q. And the Arroyo de las Gallinas comes down, does it not, from that Cañada or valley in which there are several locations, including that — Tom Whelen and others?

A. Yes, that is my understanding.

Q. Don't they call that the Cañada de las Gallinas, and further down the arroyo begins, continuing on, as the arroyo de las Gallinas—is that right?

A. I never heard the name applied below where the ranches are on the prairie. I have crossed the arroyo backwards and forwards. I have been down there, but the names given by the Mexicans down there I don't understand as well as I do up in the district proper,

for I have done more prospecting in the rocks. I had a ranch down there.

Q. You never paid much attention to the names down there?

A. No, sir.

Q. Did you ever hear of a grant out there called the Sitio de los Cerrillos, in that region?

A. No. I have heard of the Los Cerrillos grant.

136 Q. You never heard of the one adjoining they call the Sitio Los Cerrillos?

A. No, sir.

Q. Ever hear of one called the Sitio de Juana Lopez?

A. I have heard of the Juana Lopez grant.

Q. Is that the one they call the Mesita Juana Lopez?

A. Yes, sir.

Q. I mean another one, much smaller, known as the Sitio de Juana Lopez—did you ever hear of that?

A. I think I have heard of it.

Q. You have heard of it recently, haven't you?

A. Several years ago.

Q. Whereabouts is that situated?

A. Well, I never knew exactly, but I supposed it would take in a part of the tract down to what is known as Pino Ranch, and adjoining the main Juana Lopez grant, but it did not come up in the district, and so I paid no attention to it.

Q. Did you ever hear anything about that until after the land court?

A. I can't remember the time I heard of it first exactly.

Q. It is 14 years since the land court was created.

A. I heard of it first through prospectors, who said it came up close to the mining district, but I could not ascertain that it interfered with the claims in the hills, and so I did not pay much attention.

Q. I understand you that down below the Coyote Spring, where the water came out in the canyon, that that was called Coyote Canyon?

A. I understood it to be called that by the people who lived there in the San Marcos arroyo.

Q. Who ever told you of the Mexicans, that that was the name of it. Can you remember?

A. I think Diego Mares was one, and some others who lived in Poverty Hollow—the name of the mining camp there.

JAMES PATRICK MCNULTY, sworn.

Direct examination by Mr. M. G. REYNOLDS:

—. State your full name to the court and jury?

A. James Patrick McNulty.

Q. How old are you?

A. Fifty-six years old.

Q. Where do you reside?

137 A. At the Turquoise mines.

The COURT:

Q. Are those the mines in this suit?

A. Yes, sir. The American Turquoise Co. mines. I went there on the 2nd day of March, 1892, and took charge of the working of the property from that time until the present time.

Mr. REYNOLDS:

Q. I will ask you to state whether you have been since that time in the exclusive possession of the property representing various people?

Objected to by Mr. Clancy.

Question withdrawn by Mr. Reynolds.

Q. Who did you represent when you first went there?

A. I went to work for a man named C. G. Storey. He was then east.

Q. Now, go on, and state in your own way all that you have done there, for whom you have done it, and at what time you have done it, and how you have been there from the time you say you went there to the present time?

A. I have done the assessment work on all the claims.

Q. What claims are they?

A. For the Castillian, the Muniz, the Morning Star, the Sky Blue and the Gem claims, for each and every year, excepting one year which was exempt from doing assessment work, and I done the assessment work that year on the Muniz—that was either in 1893 or 1894.

Q. Go on and state all about what you have done — what is there—what you have constructed and all about it, give to the court a full and accurate history of what you have done, and for whom you have done it, and how you are there?

A. I worked for Messrs. Allen and Storey and for Andrews and Doty. I have written to them and they have written to me. I have letters to show for it. Also to the Farmers Loan and Trust Company—I have shipped them—and also to a man by the name of Arling, in New York.

Q. Go on and state whom you first represented when you went there in 1892?

A. Allen and Storey.

Q. Then whom did you represent?

A. Andrews and Doty.

Q. Who are they?

A. They were a company that Mr. Storey wrote me had charge of the property for the sale of stones, etc.

Q. Who else did you represent after Andrews and Doty?

138 A. Doty was the man I shipped the turquoise to——

Q. I am talking about the ownership of the mines?

A. They were the American Turquoise Company—that is the company they represented.

Q. In what capacity did you represent the first American Turquoise Company, if there were two?

A. I always shipped to the American Turquoise Company.

Q. We are talking about whom you represented, Mr. McNulty—if you were there at all, who were you working for?

A. The American Turquoise Company from that time until then after Storey sold out to the American Turquoise Company

Q. Do you know whether or not there was more than one American Turquoise Company?

A. I don't know. It was always The American Turquoise Company to me.

Q. Do you remember whether or not there was a suit to foreclose the mortgage on the mines? Do you remember anything about that?

A. Yes, sir, I do—because I have got letters to show it, stating when it was transferred from one to the other.

Q. Since that transfer, whom have you represented there?

A. The American Turquoise Company. Mr. R. A. Parker, No. 52 Wall St., New York.

Q. What has been done there. What improvements if any have been made upon the property while you were there?

A. In the workings of the mines there is quite a lot of improvements.

Q. Outside of the surface ground?

A. There is a large three-room house, and I have got a whim on the Muniz mine.

Q. What about the payment of taxes, if anything?

A. That the attorney has attended to.

Q. Have you got any tax receipts?

A. The receipts are all sent to New York. All the receipts I got here or any other place are sent to New York.

Q. What if any work besides the assessment work *have* been done on these mines?

A. Oh, there has been thousands and thousands of dollars' worth of work done.

Q. Under whose direction and supervision was that work done?

139 A. Under mine, sir.

Q. And for whom—who did you represent?

A. The American Turquoise Company.

The COURT:

Q. Do you know what township and section these claims are in?

Mr. CLANCY: That is agreed in the pleadings.

Mr. REYNOLDS: It is admitted these mines are in Section 21, Township 15 north, of Range — east. That is the admission.

Q. Are these mines located one with the other?

A. There is three of them running parellel, and one at the end, and then the Castillian. There is something like 200 feet between the Castillian and the group.

Q. Where is the house located with reference to the group?

A. There is one house I built on the Gem claim. The Muniz

house I first lived in on the Muniz claim, an old house that the Muniz had there. I lived in it several years.

Q. Was there any other house on any of the other claims?

A. Not on the American Turquoise Company's claims.

Q. How long have you lived in these houses?

A. Since the 2nd day of March, 1892.

Q. What were you doing there?

A. I was in charge of the property there for the American Turquoise Company.

Q. Has there been anybody else there in charge of the properties except yourself?

A. Not that I know of, unless when Doty and Storey came out, they might have been ahead of me you know, but they left it all to me, but of course I put them down as being over me, but I was in charge of the property.

Q. You have been continuously in charge since you have been there?

A. Yes, sir—of all the workings.

Q. When, if at all, did you first hear of the claim of Mariano Sena?

A. In either 1895 or 1896, I don't remember which year.

Q. How did you happen to hear of it?—state the circumstances.

A. By the Sena party coming out there, and this man Vroom and Purdy and some other attorney, I did not know, and Mariano Sena, and after they left there I heard of their having a claim of a grant being in there, but I did not know anything of it before; but they seemed to go around on the dump of the mine. I let nobody around there. I had been out hunting that day and when I came back I saw them there and I ordered them down from there, and after that I heard that they had a claim on there, not a claim of the mines, but I heard they had a claim on the grant.

Q. Do you know where Coyote Spring is located?

A. No.

Q. Have you ever been down to it?

A. Not that I know of.

Q. What improvements were there when you went there in 1892, and on what claim were they?

A. There were no improvements, only that old cabin they claimed they bought from the Muniz's, on the surface—no other improvements only a windlass.

Q. That was the first place you occupied?

A. Yes, in that house they claimed they bought from Muniz.

Q. I will get you to state, since you have been there, how you have exercised and performed your duties in behalf of those you represented when you were in charge of the property?

A. I have always had orders from New York, when to put on a force of men and when to let them off.

Q. I am speaking with reference to other people than you put there yourself for working purpose—the general public.

A. I don't understand you right.

Q. Well, I will put the question directly. Have you kept the general public off that property or not?

A. Did I keep them off?

Q. Yes, each and every man.

A. Yes, each and everybody I kept off, unless they would be an acquaintance of mine, and then I used to walk about with them so they could not pick up anything and take it away.

Q. How long has that continued?

A. For about 12 years.

Q. Fix the first date.

A. I kept them off from the first part of the year 1894.

Q. Has there been anybody exercised any acts of ownership over this property since you have been there in 1892, other than yourself?

A. No, sir. Of course the Indians came there, and claimed the property belonged to them you know, and tried to put me
141 off, but they did not do it. They came well armed, too. One of them said he was Chief. They were from San Felipe, and they said the land belonged to them long before the Spaniards came, and they wanted me to go away. This Indian was the only one—nobody ever came there that I know of.

Q. When did you build that new house on the Gem?

A. In 1891 to the best of my knowledge. No, I mean in 1901.

Q. Now, as a matter of fact Mr. McNulty, you have been in possession there. State to the court the names of the claims you have been in possession of there.

Mr. CLANCY: He has named them before.

The COURT: He named the Castillian, the Sky Blue, the Morning Star, the Gem, and the Muniz.

Cross-examination by Mr. F. W. CLANCY:

Q. Who paid you for your services?

A. The American Turquoise Company.

Q. Now, some individual must have done it—who did it?

A. It came through the mail. J. M. Allen was treasurer for awhile, and Storey sent me money through the mail and by express.

Q. Did you ever receive any pay from Andrews and Doty?

A. Yes, sir.

Q. They paid you, did they?

A. They sent it through the mail.

Q. It was from them you received your compensation?

A. Yes, sir.

Q. Ever receive it from the Farmers' Loan & Trust Company?

A. I did.

Q. And did you receive a payment from that man in New York, Mr. Alling?

A. Not to my knowledge, because Mr. Doty was in charge then and sent the money.

Q. Now, you say that there was a great deal of money spent on the property outside of the assessment work?

A. Yes, sir.

Q. How much was the value of that work?

A. I really cannot tell, considerable though—thousands of dollars.

Q. Do you think you have done ten thousand dollars' worth of work there?

142 A. I have.

Q. That is about as much as you have done?

A. More.

Q. How much more?

A. I cannot state now until I look over the records. I have done more.

Q. You don't know how much more?

A. No, sir.

Q. Do you think as much as fifteen thousand dollars' worth of work has been done there by you?

A. Yes, sir.

Q. More than that?

A. Yes, sir.

Q. You know what I want—you can save time by answering me and tell me to the best of your knowledge how much it is.

A. To the best of my knowledge there is over twenty-five thousand dollars' worth of work done on one mine.

Q. Which mine is that?

A. The Muniz.

Q. How much was done on the other mines?

A. I have done assessment work on the others, $100 each and every year, except one year.

Q. That is one hundred dollars' worth of work on each of the other mines?

A. Yes, sir.

Q. Now what has been the value of the output of the property?

A. That I know not. I ship stone- when I take them out, but I don't know what they get for them in New York.

Q. You don't know anything about the value of the stones you take out?

A. No, sir; I have not sold any.

Q. I did not ask you whether you had sold any.

A. Then I do not know the value.

Q. With all your years of experience there, you have no idea of the value of a piece of turquoise?

A. I have not, only by hearsay, that is all.

Q. Well, you have from what you have heard from other people—you have learned what the value of turquoise is?

A. Some say they buy for 25 cents a caret, some say $5.00

143 per carat, but I don't know what my company gets for them.

Q. I don't care what your company gets for them, I want to know what the value of the output is, when it comes out of the ground.

A. I don't know about that. I ship the stones in the rough and I could not tell you what they are worth.

Q. At the time Sena and Purdy were down there, at the time

you spoke of—didn't you tell Mr. Purdy that you were getting two hundred thousand dollars out of the mine?

A. I did, and I have told others besides, anybody who will ask me—How much did you get out of here, I says, I will not put it under two hundred thousand dollars.

Q. Don't you think now that since the time you went there to work that you have taken out and shipped away about five hundred thousand dollars' worth of stones?

A. That I do not say. I do not know anything about it. I am under oath now.

Q. I am asking your opinion.

A. I cannot say.

Q. You have no opinion at all?

A. Not the moneys' worth; No, sir.

Q. How much in quantity have you shipped from the mine?

A. That I know not.

Q. Never kept any record of it?

A. Never kept a record.

Q. Don't you know how many pounds you shipped at any time?

A. Oh, yes; sometimes three pounds in a cigar box; sometimes six pounds, but it would be rock and turquoise mixed in together.

Q. Did you always ship small quantities?

A. I ship out the rough stone and let them do what they please.

Q. How large a shipment did you make at one time?

A. I do not know.

Q. Did you ever ship a carload?

A. No, sir. Nothing that I was not able to lift myself.

Q. You sorted out what appeared to be the best and shipped it, didn't you?

A. Yes, sir; certainly.

Q. Have you done any turquoise mining on your own account?

144 A. I have. I had men to work, but not myself. I have men working at prospecting, but not getting out turquoise.

Q. Never got out any from your own mine?

A. Not for sale.

Q. Never have sold any at all?

A. No, sir. I have got claims along side of The American Turquoise Company.

MICHAEL O'NIEL, sworn.

Direct examination by Mr. REYNOLDS:

Q. State your name?

A. Michael O'Neil.

Q. How old are you?

A. Fifty-two years old.

Q. Where do you reside?

A. Three miles north of Cerrillos Station.

Q. How long have you been in this country—New Mexico?

A. Since 1878.

Q. In what par*ci*tcular locality have you been most of the time?

A. In this county, in the southern part of this county.
Q. What has been your business?
A. Prospecting and mining.
Q. Was that your business when you came here?
A. Yes, sir.
Q. Are you acquainted with the general lay of the country in and around what is known as the Turqu-ise mines?
A. Yes, sir.
Q. Do you know the Turquoise mines and the location of them in South Santa Fe county about which Mr. J. P. McNulty has just testified?
A. Yes, sir.
Q. How long have you known that locality down there?
A. Since 1880.
Q. Have you been over that country south of there much?
A. South of the Turquoise mines?
Q. Yes, sir. South and east of them?
A. Yes, sir.
Q. Are you acquainted with a place down there called Coyote Spring?
A. Yes, sir.
Q. How long have you known it?
145 A. Since 1880.
Q. Describe it to the court—the character of it and the character of the country around it.
A. It is the south end of what is known as the "Gallinas Draw"—as we call it. As it goes south, it becomes a canyon, and it is very rocky and the water seeps out all along; it is no regular spring, but the water comes out of the sides of the canyon, and it is about two and a half or three miles in extent, and the ground on each side is quite rocky and in most places quite steep.
Q. I will ask you to state whether or not you have observed the condition of the country near and around it with reference to ruins of houses?
A. About two miles from there at San Marcos there are ruins there, twenty-five or thirty acres in extent—that is all I know of.
Q. In and around—in close proximity to the Coyote Spring, are there any ruins of any adobe houses or walls?
A. No, sir, not that I have even seen.
Q. What is the condition of the country so far as ruins and apparent use and occupation of it—when you first knew it?
A. As it is now. It has been used as long as I have been in that section of the country. The sheep people use it for lambing purposes in the spring, and build corrals and such as that around it, but buildings and walls I have never seen there.
Q. Have you ever been up and down the canyon?
A. Yes, sir, hundreds of times.
Q. Have you been north and south of it on the hills?
A. Yes, sir.
Q. Have you been east and west of it?
A. Yes, sir.

Q. As early as 1880?
A. Yes, sir.
Q. How far is that spring from the Turquoise mines claimed by The American Turquoise Company, if you know?
A. It is about two miles.
Q. What direction are the mines from the spring?
A. It would be northwest.
Q. Do you know Mr. J. P. McNulty?
A. Yes, sir.
Q. How long have you known him?
A. I have known him since about 1886 or 1887.
146 Q. I will ask you to state, if you know, about when he went out to the Turquoise mines?
A. It was in 1892. I was living on my property at that time.
Q. Do you know who was out there before McNulty came?
A. A man named Graves and Mr. Storey and Mr. Allen.
Q. Do you know what is called the Castillian mine?
A. Yes, sir.
Q. How long have you known that?
A. Since the year 1880.
Q. Describe its condition to the court and jury, and whatever you may know about it from the time you went down there.
A. I leased the property that year from a man named Marshall and sunk a shaft and timbered it and cleaned out the old diggings and timber. It was done to my recollection about 45 feet. I leased on it for 14 or 15 months, then the owner took it back. The next man there was a Mr. Parmalee, Milton Parmalee—that is my recollection.
Q. Do you know anything about what is called the Gem mine?
A. Yes, sir.
Q. What do you know about it?
A. That first came to my notice I think in 1894.
Q. By whom?
A. By a man named Storey and Allen—they were both partners on that property—J. F. Allen, was the name.
Q. In the year 1894?
A. That is my recollection of it.
Q. What was done on it if you know?
A. When I saw the property at that time it had a shaft on it, it seems to me 25 or 30 feet deep, in that neighborhood.
Q. You testified that McNulty went there in 1892.
A. But this is the first time I happened to go to that shaft—that is, to this property called the Gem.
Q. Now about the Muniz mine—do you know anything about that?
A. Yes, sir.
Q. When did you first know about the Muniz?
A. That location I happened to go up to the day the boys came out and located it.
Q. Who were they?

147 A. Three brothers—named Muniz.

Q. What work if any was done on that—what was its condition?

A. The first time, when they made their location, they were down four or five feet in depth.

Q. What if any improvements were made at that time, or about that time, if any?

A. The first time I saw it, that was early in 1891, there was something like three or four feet in depth, along there.

Q. Was there any improvements on it such as houses?

A. They had some tents—there was no house there at that time.

Q. Was there a house ever put on it afterwards?

A. Later; yes, sir.

Q. Who by?

A. By the Muniz people.

Q. The Morning Star, do you know anything about that claim?

A. I heard about that about the same time as the Sky Blue, that was in 1894.

Q. Who was there in charge of that at that time, if you know?

A. Mr. McNulty was in charge at the time, but the location had been made by Storey and Allen.

Q. How are those mines located, one with reference to the other?

A. They are south and east of the Muniz, and east of the Castillian. I am assuming my right hand to be east. The Muniz is on the hill, and the others are in a southeast course, and the Castillian was over on the other little hill to the west.

Q. Are those mines close enough together to be called in mining terms, what they call a "group"?

A. We always considered it such.

Q. They are in the immediate vicinity?

A. Yes, sir.

Q. I will ask you to state, if you can, if you know the names of the arroyos down there in that country in and around the Coyote Spring?

A. Yes. The Gallinas is on the northeast; the Coyote is southwest; the San Marcos is still south of that.

Q. Did you ever hear in that country and in that immedi-
148 ate vicinity of an arroyo or a name such as the "Arroyo del Oregano"?

A. No, sir; I never did.

Q. Or the Questa del Oregano?

A. No, sir.

Q. Or the "Arroyo Cuesta del Oregano"?

A. No, sir.

Q. When was the first time you ever heard of the claim of Mariano Sena to this property down there under a grant?

A. About six or seven years ago.

Q. When did you ever hear of a claim of Leyba, or a grant down there?

A. No, sir; I never did.

Q. What was your habit of inquiry with reference to the location

of land grants and patented lands and claims in there in doing your prospecting?

A. Well, if you want to go to early dates, I will tell you what brought me to that section of the country.

Q. I don't care to know your personal habits. I mean your habits of inquiry if any, with reference to whether or not you could locate your mines on private property or public domain, and whether there was any private property in the public domain?

A. I came here on and old map that was given to me in Leadville, Colorado, showing this country, and showing what was supposed to be grants and what was supposed to be government domain, and when I came here, that was one of the properties I came to locate,—what was known as the Old Castillian mine. I came here in 1878 for that purpose, and when I came here it was located.

Q. Following that did you make any inquiries with reference to the location of land grants down in that country?

A. Yes, sir.

Q. Did you ever hear of the Jose de Leyba grant?

A. No, sir.

Q. Did you ever hear of the Leyba's having any interest in property there?

A. No, sir.

Q. Ever make any inquiry at the Surveyor General's office?

A. I did, carefully.

149 Q. Did you make any inquiry in the office of the Register of the land office?

A. I did through the Surveyor, Mr. Atkinson, and his clerk, David Miller. I had plats and a map of all that section, but when my camp was burned up in 1893, I had about a dozen of those old maps that went up in smoke; some of the maps were made by Atkinson and D. L. Miller, to all that country below there, both of the government and grant lands.

Q. Who, if anybody, was occupying and controlling or occupying the Muniz mine prior to McNulty going out there?

A. A man named Graves.

Q. Who was he?

A. I presume he was an agent under Mr. Storey. I don't know any of their private matters.

Q. I am speaking of the Muniz mine particularly.

A. Oh, this was after the property went into the hands of Allen and Storey. They were in the east at the time, and this man Graves was their agent at the time.

Mr. CLANCY: You mean as far as you know.

A. Yes, I stated that—so far as I know.

Mr. CLANCY: I ask that that be stricken out.

Mr. REYNOLDS: That part relating to Graves, I am perfectly willing to have stricken out.

Mr. REYNOLDS:

Q. Now who was in possession or control of the property appar-

ently so far as you know, of the Gem Lode, prior to McNulty going there?

A. This same man Graves.

Q. And the same applied to all these mines there?

A. Yes, sir; so far as I know. He had all the interests of the men Allen and Storey to these properties, outside of the Muniz and Castillian. I never became familiar with them, or happened to go to where they were until 1894—that was my first knowing them, but he must have been there. He done the assessment work there as far as I know up to that time.

The COURT: He was commonly reputed to have charge of them?

A. Yes, sir.

Cross-examination by HARRY CLANCY:

Q. In your residence of 25 years in the neighborhood of the Turquoise mines, you have become familiar with many of the natural objects on the earth's surface in that locality, have you not?

150 A. Yes, sir.

Q. Did I understand you to say that the Coyote Spring was located at the end of a draw called the Gallinas Draw?

A. I did not say a draw, I don't think—it is south of it. I could not say how far south; the *draw* is quite level except when you get into the foot-hills, it becomes quite broken, and the spring from that down is almost in a box canyon for two miles and a half, until you get to the place called "Poverty Hollow."

Q. How is the arroyo where the spring is situated, above the spring?

A. It is all broken up the same as it is east of it.

Q. This arroyo in which the spring is situated, have you known that arroyo by any name?

A. Only as Coyote Canyon.

Q. How far above the Coyote Spring does this Coyote Canyon extend?

A. I don't understand you.

Q. Above, as the water comes down, in whatever direction the water may run?

A. The spring is in the Coyote Canyon. It is a little stream of water in what is known to us as Coyote Canyon.

Q. And from the Coyote Spring, do I understand you, there is a stream of water flowing?

A. A small stream; yes, sir.

Q. Is there any water flowing in that arroyo above the spring?

A. Not that I know of.

Q. What is the character of this arroyo right at the spring, so far as the banks of the arroyo are concerned?

A. In the way you speak of it, I do not understand it as a spring. The water comes out on both sides of the canyon. I don't know what you call the spring, whether here or there (indicating on a plat—it comes out on both sides of the canyon and extends down for nearly two miles before it sinks into the gravel.

Q. Now what you understand to be the Coyote Spring, and this

canyon in which you state it is situated, how far up that canyon or arroyo have you followed above the spring?

A. I have been up there to the Santa Fe mountains.

Q. Does that arroyo extend all the way to the Santa Fe mountains?

151 A. No, sir, it extends probably one-half or three-quarters of a mile and then it becomes table land or mesa.

Q. Right at the Coyote Spring, is there any trail that crosses the arroyo?

A. There is a great many sheep trails. I could not tell whether one or one hundred.

Q. Is it not possible right at the Coyote Spring to drive a team across that arroyo and proceed on to San Marcos Springs for instance?

A. No, sir. I am not familiar with that.

Q. Do you say you could not drive a team of horses across that arroyo immediately at the spring from one side to the other?

A. I do. Because there is points there where it is from 75 to 150 feet in height.

Q. Now, Mr. O'Neil, did you ever hear of that canyon you spoke of called by any other name?

A. No, sir.

Q. And you are reasonably familiar with the natural objects in that general vicinity are you not?

A. Yes, sir.

Q. Did you ever hear of the Arroyo de la Piedra?

A. No, sir.

Q. You don't know that—Are you familiar with the Arroyo de las Gallinas or Canada de las Gallinas?

A. I don't know the Canada—unless it is this Vega—but that is not what I would call a canada.

Q. I say Canada, I did not say Vega.

A. I don't understand your question.

Q. You know where the homestead location of Tom Whalen is?

A. Yes, sir.

Q. Did you ever know of it to be in the Canada de las Gallinas?

A. That is the place.

Q. Did you ever follow that Canada de las Gallinas or Arroyo de las Gallinas down to where it empties into a larger arroyo or a larger canyon?

A. I have followed it down to where it goes into a box canyon.

Q. How far above the junction of those two arroyos where

152 the Arroyo de las Gallinas empties, how far above is the Coyote Spring?

A. That I could not tell you positively.

Q. More or less?

A. It seems to me it is below the old man's ranch you spoke of—a half or three-quarters of a mile.

Q. I am not asking from the old man's ranch. I am asking from the point where the Arroyo de las Gallinas runs into what you call

the Coyote Canyon. How far above that junction is the Coyote Spring?

A. I don't understand it as you state it. The Arroyo Gallinas is the headwaters of the Coyote, as I understand it.

Q. Then do I understand you where the Gallinas empties into the canyon, the spring is right at that point?

A. I could not exactly tell you.

Q. Is it above or below it?

A. It is in that canyon.

Q. Then you cannot tell in regard to the Arroyo de las Gallinas?

A. It is below this man's ranch. I never measured it. I have been up and down it a good many times, but I could not tell you the exact distance.

Q. I am not assuming that the Coyote Spring is in the Arroyo de las Gallinas, I am assuming it is in the Canyon of the Coyote, as you say it is. Now don't you understand?

A. Yes, sir.

Q. You say the Arroyo de las Gallinas runs into the Canyon of the Coyote?

A. Yes, sir.

Q. Now from the point where that empties in, how far either up or down the Coyote Canyon, is the Coyote Spring?

A. That question I could not answer more than this—What we call the Gallinas is a vega, and as it comes into the south or becomes steeper, and as it goes south it is called Coyote Canyon, as it goes out on the vega it is called the Cañada, but they are continuous all the way through.

Q. This Canyon Coyote, you have never heard referred to as the Arroyo de la Piedra?

A. No, sir; I never have.

Q. Did you ever hear of a locality known as the Cañada Juana Lopez?

A. Yes, sir; I have.

153 Q. Do you know where that is situated?

A. Yes, sir.

Q. Where is it?

A. It is in the canyon——

Q. Don't confuse the canyon with the Cañada.

A. I am not familiar with the Spanish names. I do not understand the Spanish language, only just in a small degree, but there is a great many names I get mixed up in.

The COURT: Explain the difference between a canyon and a cañada.

Mr. CLANCY: A canyon is where the walls are practically abrupt, not necessarily perpendicular, and a cañada is where the walls may be rather high, or rather low, and the land spreads out.

WITNESS: That is what I call a vega.

Mr. CLANCY: A vega is a meadow.

WITNESS: I am not versed in the Spanish language, but I know a good many words.

Q. Well, to return to the Cañada Juana Lopez—where do you say that is?

A. It is west of Bonanza.

Q. Now do you know where the Cañada de los Cerrillos is?

A. No, sir; I do not, without it is the Galisteo river.

Q. Do you know the location of the Cerrillos grant?

A. Not all together. I know part of it, that is, I know what is termed the north end of it. It would be the east end.

Q. How do you happen to know the east end of it?

A. Well, I have got property that is adjoining the Castillian mine. I had it surveyed in 1897, and the south line of the Cerrillos Grant or tract as they call it at that time, took in a part of the property I have located.

Q. Are you acquainted with the Sitio de Juana Lopez?

A. No, sir; I don't know a name of that kind.

Q. Are you acquainted with the Sitio de los Cerrillos?

A. No, sir, not by that name.

Q. Do you know where the Penasco Blanco de las Golindrinas is?

A. No, sir, I do not.

Q. Do you know where the Guicu Arroyo is?

A. No, sir.

Q. Do you know a locality called "El Arco" down there?

154 A. No, sir.

Q. Do you know a place called Los Cerrillos, not the railroad town, but another place, Los Cerrillos?

A. Well, Bonanza used to be called that by the Mexican people. It is simply a name I passed over. I can't tell you whether it was right or wrong; to the Americans it has been known as Bonanza, but I have heard it called Los Cerrillos.

Q. Right where the Turquoise mines are located, what is the highest peak there known as?

A. The Turquoise Peak.

Q. Down in that locality are you acquainted with the Cerrito de Juana Lopez?

A. No, sir.

Q. You speak some Spanish, do you not?

A. Very little.

Q. Well acquainted with all the people living in that section of the country who are natives or speak the Spanish language?

A. Fairly well; yes, sir.

Q. You have derived your information in regard to many of these localities from the Mexican people, have you not?

A. No, sir; I never did. The few points I have got, I got from the land office here in regard to surveys. These names, I never paid any attention to them.

Q. I am speaking about the names of localities?

A. I never got them except from others.

Q. From whom did you get the information in regard to this Coyote Canyon—who told you that was Coyote Canyon?

A. I have heard it called so by the natives.

Q. Can you tell what particular native—mention his name?

A. Why, Nasario Gonzales, and Andres C. de Baca—such people as them.

Q. Andres C. de Baca has told you that was the Coyote Canyon?

A. Yes, sir.

Q. Anybody else?

A. Yes, a number of them. It has been the name among the natives ever since I have been in the country.

Q. What other natives have ever told you that is the Coyote Canyon?

A. Why, Frank Gonzales, Juan Narvais, Nick Narvais.

Q. Can you recollect anybody else?

155 A. Jesus Montoya.

JAMES PATRICK MCNULTY recalled.

Cross-examination continued by Mr. F. W. CLANCY:

Q. Such possession you had of these claims you testified to you have always claimed to be under mining locations, made under the United States land laws, haven't you?

A. Yes, sir.

Q. Do you know where the surveyed line of the Cerrillos Grant is near where the mines are?

A. I do. I know one corner stone. I know wher- the old survey was. That took in a part of the Muniz mine.

Q. Did it take in any of the others?

A. Yes, the Morning Star and the Castillian.

Q. But the new survey left them out?

A. Yes, sir.

Q. Do you remember when the new survey was made?

A. I really forget now.

DIEGO MARES sworn.

Direct examination by S. B. DAVIS, JR.:

Q. State your name?

A. Diego Mares.

Q. Where do you reside?

A. I live in Precinct No. 6, Santa Fe county.

Q. In what town is that?

A. La Cienega.

Q. Are you acquainted with the mining claims known as the Muniz, the Morning Star, the Gem, the Sky Blue, and the Castillian?

A. I know the Castillian and the Muniz. That is all I know.

Q. How long have you known the Castillian mine?

A. Since it was discovered.

Q. And when was that?

A. I don't remember exactly, but I think it was in 1880.

Q. Who was in possession of it, who was working it at that time, if any one?

A. A gentleman by the name of Marshall.

Q. And then after him who worked it?

A. I don't know who worked it after Marshall.
Q. Do you know Mr. McNulty?
A. Yes, sir.
Q. How long have you known him?
156 A. I have known him since 1886.
Q. Did you ever know of him at any time to be working there or in possession of those mines?
A. Yes, sir.
Q. Now when did you first see McNulty in possession of those mines, or working them?
A. I don't recollect the exact year.
Q. More or less, what year?
A. More or less 1893 or 1894, I am not sure.
Q. Now speaking of the Old Castillian mine, who, if you know, was working that mine immediately before McNulty came there?
A. A man named Storey.
Q. Now, take the Muniz mine—Who was working that mine before Mr. McNulty came there, if any one, to your knowledge?
A. Mr. Storey worked it.
Q. More or less, for how many years prior to the time when McNulty came there did Storey work that mine?
A. More or less about three years.
Q. Now who worked the Muniz mine before Storey worked there, if anybody?
A. I do not know of anybody.
Q. Is there a house on the Muniz mine?
A. Yes, sir.
Q. Do you know who built that house?
A. Yes, sir; Faustin Muniz.
Q. Do you know about when that house was built, about how many years before McNulty came there?
A. No, sir.
Q. Was it before or after Storey worked the mine?
A. Before Storey worked the mine.
Q. Did you ever see the Muniz's working the mine?
A. Yes, sir.
Q. Before or after Storey came there and worked it?
A. Before Storey worked it.
Q. Who, if anybody, lived in that house on the Muniz mine?
A. I only saw Muniz's live there.
Q. Who lived there after Muniz got through?
A. Mr. Storey.
Q. And after Storey, who lived there?
157 A. Mr. McNulty.
Q. Who has been working these mines, if anyone, to your knowledge, since the time when Storey lived there, and since the time Storey left them?
A. Only Mr. McNulty.
Q. Do you know some other mining claims near to the Muniz mine?
A. I know there are mines there, but I do not know the names.

Q. How many claims do you know join the Muniz?
A. I only know the Muniz mine.

Mr. REYNOLDS: I desire to ask him about the location of the country down there.
The COURT: You may proceed.

Mr. REYNOLDS:

Q. How long have you known that country in and around the mines?
A. I know the place since I was fifteen years of age.
Q. How old are you now?
A. Fifty-eight years.
Q. Do you know where the Coyote Spring is?
A. Yes, sir.
Q. When did you first know it?
A. When I was of that age.
Q. Have you been down in that country often?
A. I have been there very often.
Q. Do you know the name of the arroyo in which the Coyote Spring is situated?
A. Yes, sir.
Q. What is the name?
A. It is the Arroyo de la Cañada de las Gallinas.
Q. Have you been familiar with that country and the people down there since you were a boy, fifteen years old?
A. Yes, sir. I was herding cattle there for about a year.
Q. Did you ever hear among the old people, or from any other source of the Cuesta de Oregano?
A. No, sir.
Q. Did you ever hear of the Arroyo de la Oregano?
A. No, sir.
Q. Or the Arroyo Cuesta de la Oregano?
A. No, sir. I have heard many who were very old there and I never heard that name mentioned of the Arroyo de la Oregano, or the Cuesta de la Oregano.
158 Q. Do you know the location of the San Marcos Spring?
A. Yes, sir.
Q. How far is that from the Coyote Spring?
A. About two miles distant.
Q. Is it north or south of the Coyote Spring?
A. South.
Q. When you first went down there into that country was there any ruins of old adobe houses, or houses near or in the immediate vicinity of the Coyote Spring?
A. No, sir.
Q. You were over that country carefully?
A. Very carefully.
Q. Was there any ruins south of it any distance, and if so, what?
A. There were the ruins of corrals, where sheep had been lambing.

Q. I am speaking now of adobe houses—walls three or four feet high. Did you see any such ruins?

A. No, sir.

Q. Are there any ruins down around San Marcos Spring?

A. Yes, sir.

Q. Are there any other ruins in that immediate vicinity within two or three miles of the Coyote Spring, except the San Marcos ruins?

A. No, sir.

Q. When, if you ever did, did you first hear of the claim of Mariano Sena to the land grant down in that country?

A. I never heard it until the same Mariano Sena sent me a letter with a blank so I might fill it out to transfer to him the right which I have there which consists of 160 acres of land under a patent.

Q. When was that land patented?

A. I took the land in 1887, and I obtained the patent five years thereafter.

Q. Did you ever hear from anybody of the Leyba Grant prior to that time?

A. No, sir.

Q. Did you ever hear of anybody down there in that country or know of anybody or hear of anybody in that country claiming that property or the ownership under the Leyba Grant?

A. No, sir; never.

159 Q. Was there anyone down in that country when you went there in and around Coyote Spring, or up to the Turquoise hill, Cerro Palado? Do you know that place?

A. Yes, sir.

Q. Is that the location of the present Turquoise mines?

A. Yes, sir.

Q. Did you know of or hear of anybody claiming a land grant known as the Leyba Grant down in that country?

A. No, sir; never.

Q. Covering any portion of the Coyote Spring, or the Hill Cerro Palado?

A. No, sir; never.

Cross-examination by H. S. CLANCY, Esq.:

Q. Where do you say you live?

A. At La Cienega.

Q. How long have you lived there?

A. I was born there.

Q. How long have you lived in La Cienega?

A. I have lived some years. My present residence is at La Cienega, but I absent myself from there when I go to work, but I return to La Cienega, as I have my residence there. I recognize that precinct as my residence.

Q. You say you have your residence and house at La Cienega,—have you any other house?

A. I have a house in Waldo when I go to work there.

Q. No others?

A. No, sir.
Q. You never built a house on this homestead entry of yours?
A. Yes, sir.
Q. How does it happen you answered just now that you had no other houses?
A. That does not matter in this business.
Q. Kindly answer my question. You just stated that you had a house at La Cienega, and another house at Waldo, and that you had no others, and now you state that you did have a house on this land to which you hold a patent.
A. Yes, I have a house there. I have three houses.
Q. No more?
A. No, sir.
Q. You are sure of that?
A. Yes, sir.
160 Q. You are very familiar with the localities down in that section of the country?
A. Yes, sir.
Q. Did you ever hear of an arroyo in that country called the Arroyo de la Piedra?
A. Yes, sir.
Q. Will you tell the court and jury where the Arroyo de la Piedra is?
A. Yes, sir.
Q. Please do so.
A. The principal arroya which we call the Arroyo de las Gallinas connects with the Arroyo of the Ojo del Coyote, a distance of about 200 yards from the spring below, and we call it the Arroyo de la Piedra.
Q. Yes, you have told the truth—that is the description of it. Now, Mr. Mares, where the Arroyo de las Gallinas runs into the Arroyo de la Piedra, how far from that point is the Ojo del Coyote?
A. Where the Arroyo Coyote connects with the Arroyo Gallinas about a distance of 200 yards, from there on we call it the Arroyo de la Piedra.
Q. I am asking you about the Ojo del Coyote?
A. About 150 yards, more or less. I cannot give it exactly.
Q. Now, do I understand you that the Ojo del Coyote is situated in what you call the Arroyo del Coyote?
A. Yes, sir; in the Arroyo del Coyote.
Q. Now how far above where the Arroyo de las Gallinas comes in, is it above or below that junction?
A. It is to the east—above.
Q. Now will you describe to us the surroundings right at the Ojo del Coyote. The character of the banks of the arroyo?
A. I can give you a description more or less. The most of it is an arroyo, and after you come up from the bottom of the arroyo to a distance of fifty feet, everything is high on either side until you get to fifty paces above, then it gets more level but it is arroyos and banks.
Q. Right where the water first appears, in what you call the Ar-

royo del Coyote, is it not possible to drive a wagon and horses across the arroyo?

A. With a great deal of difficulty.

Q. At that point is there not a trail that crosses the arroyo,
161 that goes to the Ojo San Marcos?

A. Yes, sir, there is.

Q. And you say that with some difficulty a team can be driven across the arroyo at that point?

A. A team can cross there with difficulty, but it can cross.

Q. You say you have never heard of the Cuesto del Oregano?

A. No, sir.

Q. Is it not true that to the south and east of Coyote Spring, there is a Cuesta?

A. There is, yes, sir; to go to the hills.

Q. But you have never heard that called the Cuesta del Oregano?

A. No, sir, and I worked there when I was a little boy.

Q. And you never heard of the Leyba Grant?

A. Never. Never.

Q. Are you acquainted with the Cerrillos Grant?

A. I know one grant of the Cerrillos, as we call it before the railroad came we used to call it Cerrillos, and afterwards they changed the name—we do not know why.

Q. Was it known as the Cerrillos Grant?

A. I don't know it.

Q. Do you know of the Sitio de los Cerrillos?

A. No, sir.

Q. Did you ever hear of the Sitio de Juana Lopez?

A. No, sir, neither.

Q. You are acquainted with the Cañada de Juana Lopez, are you not?

A. Yes, sir.

Q. And you are acquainted with the Cañada Guicu?

A. Yes, sir.

Q. Are you acquainted with the Penasco Blanco de las Golondrinas?

A. Yes, sir.

Q. You have known that for many years?

A. Yes, sir.

Q. It is a well known land mark in that vicinity is it not?

A. Yes, sir. It is known as Penasco Blanco.

Q. Do you know the Cerrito de Juana Lopez?

A. Yes, sir.

Q. Where is the Cerrito de Juana Lopez situated?

A. From where?

162 Q. Well, say from Pino's Ranch?

A. It is to the west from Pino's Ranch.

Q. Have you ever heard of a canyon known as the Canyon of the Coyote?

A. No, sir.

Q. Do you know of a mountain peak, in that locality, called Cerro Viejo?

A. No, sir.
Q. Did you ever hear of the land grant in that section of the country known as the Pueblo Viejo de la Cienega?
A. No, sir.
Q. Do you know where the Pueblo Viejo de la Cienega is?
A. No, sir; I never heard of it.
Q. And I believe you stated that you were well acquainted with the natural objects in that vicinity?
A. What do you mean by that?
Q. Didn't you state before in your testimony that you were familiar with the natural objects on the earth's surface, in that locality?
A. Ask me what you want and I will answer you.

The COURT:

Q. You know the hills and canyons there do you?
A. Yes, sir, I know the hills and the canyons and the rods and the trails and the arroyos and the embankments.

Mr. CLANCY:

Q. Are you acquainted with the old road that goes from Los Cerrillos to Pecos?
A. No, sir, I do not know it.

An adjournment was here taken until Friday morning, September 1st, 1905, at 9 o'clock a. m.

FRIDAY MORNING, *Sept.* 1, 1905—9 a. m.

Mr. REYNOLDS to Court: After consultation with Mr. Davis, and the fact that we have pretty near tried the case, I would ask leave now to withdraw the demurrer to the evidence and we will go ahead with the case relieved of it, and let it stand as it was.

Mr. REYNOLDS: I desire now to offer in evidence a plat of Mineral Survey No. 1087, Cerrillos Land District of the claim of the American Turquoise Company, known as the Gem Group, in the Santa Fe Mining District, showing the Morning Star, the Muniz, the Gem and Sky Blue lodes, dated Feb. 2nd, 1901.

163 Marked Defendant's Exhibit No. 61.

Mr. REYNOLDS: I also offer in evidence Mineral Survey No. 1086 of the claim of the American Turquoise Company, known as the Castillian lode, in the Cerrillos Mining District, survey and plat dated January 23rd, 1901.

Marked Defendant's Exhibit No. 62.

ALEJANDRO MONTOYA, sworn.

Direct-examination by M. G. REYNOLDS, Esq.:

Q. What is your name?
A. Alejandro Montoya.
Q. What is your age?
A. I have sixty-nine years.

Q. Did you testify in the case of Sena vs. The United States and the American Turquoise Company, in the Court of Private Land Claims in the year 1899 or 1900?

A. I am not certain about it.

Q. Where do you reside?

A. I live at Cerrillos.

Q. How long have you lived there?

A. About 18 or 19 years.

Q. Where were you born?

A. At La Cienega, on the Santa Fe river, below here.

Q. How long did you live there before you went away?

A. I lived there about 18 or 19 years ago.

Q. What is your business?

A. I work at the slaughter house.

Q. Do you know where the location of the Cerro Pelado is, down below Cienega?

A. Yes, sir.

Q. Do you know whether it is called by any other name?

A. No, sir.

Q. Do you know the location of the Turquoise mines, which Mr. McNulty is alleged to have had charge of?

A. Yes, sir.

Q. Where are these mines with reference to the Cerro Polado?

A. To the south, I think.

Q. Are they close to it or far away from it?

A. Those I know are right at the foot of the hill.

Q. How long have you known that country there?

Q. I have known that place since I can remember.

164 Q. Are you familiar with the country in and around San Marcos Pueblo—the old Pueblo?

A. Yes, sir.

Q. Do you know the location of the spring called the Coyote Spring. Do you know that spring in that country?

A. Yes, sir.

Q. How long have you known that?

A. I have stated that I know that place ever since I can remember, and I have been there a great deal.

Q. Do you know the name of the arroyo or Cañada in which it is located or near which it is located?

A. Yes, sir.

Q. What is the name of the cañada?

A. There are two cañadas that come together.

Q. What are they?

A. That of La Gallinas, and the other one is called the "Cañada Arroyos."

Q. Do you know the cañada by any other name?

A. No, sir.

Q. Did you ever hear of, at any time during your life, the name of a place down there called the Arroyo Cuesta del Oregano?

A. No, sir.

Q. Or the Arroyo Oregano?

A. No, sir.
Q. Or the Cuesta of the Arroyo del Oregano?
A. No, sir.
Q. When did you first, if you ever did, hear of this claim of Mariano Sena for a grant down there in that immediate country?
A. I have not heard of it.
Q. Are you acquainted with the old people in that country?
A. Yes, sir. I know some old people there.
Q. Did you ever hear of what is called the Jose de Leyba Grant, down in that country?
A. No, sir.
Q. Did you ever know of anybody down in that country, or being down there at any time, or heard of anybody being down there at any time, during your recollection, claiming to own or claiming to have any interest in what is known as the Jose de Leyba Grant?
A. No, sir.
165 Q. Were you acquainted with Nasario Gonzales in his life time?
A. Yes, sir.
Q. Is he living or dead?
A. He is dead.
Q. Do you know whether Nasario Gonzales, deceased, is the same man who was up at the land court at the time the case of Sena vs. The United States was tried up at the Federal building?

Mr. CLANCY: I will admit that Nasario Gonzales referred to is the one that is dead.
Mr REYNOLDS: That is all I want.

Q. What is the character of the country in and around the Cerro Pelado?
A. From the Cerro Pelado it is prairie on this side.
Q. What were you doing down there in that country when you were there as a young man?
A. I used to herd sheep for my father.
Q. How old were you?
A. I must have had about 25 years of age.

The COURT:

Q. That is when you first went there?
A. Yes, sir.

Cross-examination by Mr. H. S. CLANCY:

Q. Are you the same Alejandro Montoya who testified before the Land Court in Sante Fe up in the Federal building in the year 1900?
A. Yes, sir.
Q. Did you testify at that time that you were 77 years of age?
A. I do not know.
Q. You state now that you are 69 years of age.
A. I desire the court and lawyers to excuse me if I make a mistake. I am quite deaf, and I do not hear well and I am liable to make mistakes at times.

Q. You say you are well acquainted with the Ojo del Coyote?
A. Yes, I have been there at the Ojo del Coyote.
Q. Will you describe to the court and jury the sourroundings of the Ojo—the kind of an arroyo it is situated in?
A. I have stated that it is in the Cañada de las Gallinas.
Q. Didn't you state a few minutes ago that it was situated in the Arroyo Canyon?
166 A. No, sir, I did not. I said in the Canada del Arroyos.
Q. And now you state it is in the Candada del Gallinas.
A. The Canada de las Gallinas and the Canada Arroyo come together below where the spring is.
Q. Do you mean where the water comes out of the ground is above where the Canada de las Gallinas and the Canada de Arroyos come together?
A. No, sir, it is below.
Q. It is below that junction?
A. Yes, sir, it is a little below the junction of the arroyos.
Q. What is the arroyo below the junction called?
A. Just below the junction of the arroyos it is called El Coyote.
Q. Did you ever hear of an arroyo in that locality known as the Arroyo de la Piedra?
A. Yes, sir. It is below the Coyote.
Q. Is it the same arroyo in which the Coyote Spring is situated?
A. Yes, sir.
Q. Now directly at the Ojo del Coyote there is a trail across the arroyo going towards San Marcos, is there not?
A. Yes, sir, there is one.
Q. And at that point it is possible to drive a wagon and a team across the arroyo, is it not?
A. Below the arroyo you can pass with a team and wagon, but above you cannot for it is a trail only.
Q. Below the spring you can pass with a wagon?
A. Below the arroyo there is a road that you can pass with a wagon, above is a trial.
Q. How far below the spring is the wagon road?
A. It must be about 100 yards, a little more or less.
Q. Below the spring?
A. Yes, below the spring.
Q. You have stated that you have never heard of a land grant in that vicinity known as the Jose de Leyba Grant?
A. No, sir.
Q. Did you ever hear of a locality in that neighborhood known as the Sitio de los Cerrillos?
A. No, sir, not by that name.
Q. Did you ever hear of a locality known as the Sitio Juana Lopez?
A. I know Juana Lopez.
167 Q. I am asking you about the Sitio Juana Lopez, and not the Merced de Juana Lopez?
A. You mean where the Juana Lopez is situated?

Q. I do not mean where the house of Juana Lopez is situated. I mean a locality known as the Sitio Juana Lopez?

A. No, sir.

Q. Are you acquainted with the Penasco Blanco de las Golondrinas?

A. Yes, sir.

Q. You are well acquainted with that rock?

A. Yes, sir.

Q. Did you ever hear of a land grant in that neighborhood known as Los Cerrillos?

A. No, sir.

Q. Did you ever of a land grant in that neighborhood known as the grant of Sebastian de Vargas?

A. No, sir.

Q. Did you ever hear of a grant in that vicinity known as the Pueblo Viejo de la Cienega?

A. No, sir.

Q. Do you know where the Pueblo Viejo de la Cienega is?

A. I have seen at the Mesita Cienega where the Cienega commences it looks like an old Pueblo.

Q. There are ruins of an old Pueblo there are there not?

A. Yes, there are ruins there.

PEDRO MUNIZ, sworn.

Direct examination by S. B. DAVIS:

Q. What is your name?

A. Pedro Muniz.

Q. Where do you reside?

A. Here in Santa Fe.

Q. How old are you?

A. I am going on 50 years.

Q. Do you know a man named Faustin Muniz?

A. Yes, he is my brother.

Q. Is he living or dead?

A. He is dead.

Q. Do you know a mine or mining claim situate in Santa Fe County, known as the Muniz mine?

A. Yes, sir.

168 Q. Did you ever have any connection with that mine at any time?

A. Yes, sir.

Q. What was it?

A. I worked there in 1890, when my brother and myself built a house there. After having worked it about a year we sold it to a Mr. Storey.

Q. What was your relation to the mine that you were able to sell it to Mr. Storey?

A. We had worked there, and he offered to buy our work there.

Q. Do you know who located the mine?

A. Myself and my brother.

Q. Do you know a mine located near the Muniz mine known as the Old Castillian?

A. Yes, sir.

Q. In 1890, when you were working the Muniz mine, was anybody working the Castillian mine?

A. I saw Mr. Cartwright and Parmalee work there before.

Q. Do you know how long before 1890, they worked that mine?

A. No, sir.

Q. Did you ever see Mr. Storey working that mine?

A. Yes, sir.

Q. In what year?

A. In the years 1890 and 1891.

Q. Do you know J. P. McNulty?

A. Yes, sir.

Q. Who has been working the mines if you know since 1891?

A. Which mines?

Q. The Muniz and the Castillian?

A. I have seen Mr. McNulty only.

Q. I believe you stated that you and your brother built a house on the Muniz mine?

A. Yes, sir.

Q. Did you live there?

A. Yes, my brother lived there, and he had some goats there and herded them there before we sold the mine.

Q. And after you and your brother ceased to live in that house, who, if anybody, lived in it?

A. Mr. Storey, the man to whom we sold.

169 Q. And after Mr. Storey?

A. Mr. McNulty.

Q. Do you know a spring in that general locality known as the Ojo del Coyote?

A. Yes, sir, I have passed by it.

Q. When were you there first?

A. I think in the year 1870, when Mr. White went to survey that land.

Q. Can you describe that spring?

A. At that time I did not know Ojo Coyote, because we camped at the Ojo San Marcos.

Q. When did you first get to know the Ojo del Coyote?

A. About the year 1867. I was then very young. A man and myself were coming from Galisteo to Santa Fe, and we came on the trail that comes right by the Ojo.

Q. Did you camp there at that time?

A. No, sir, we only passed by.

Q. Did you observe any ruins near the spring at that time?

A. No, sir.

Q. Did you see any ruins of the old house or walls standing up two to five feet high?

A. No, sir, I did not see any.

Q. Are you acquainted with the country for a mile or two around Coyote Spring?

A. Yes, sir, I have said I passed by.

Q. Have you ever seen any ruins such as I have asked you about within those limits?

A. No, sir.

Q. Do you know a place called the Cuesta del Oregano?

A. No, sir, I have not heard it mentioned except in the last few years.

Q. Before the last few years did you ever hear it mentioned?

A. I have heard some people talking that there is a "Cuesta Oregano," but I have not known it.

Q. When did you hear that talk?

A. From the time it was said that there was a Leyba Grant there.

Q. Have you ever heard of a place called the Arroyo del Oregano, and Cuesta Arroyo del Oregano?

A. No, sir, I have not heard of it.

170 Q. Now when did you first hear of a grant known as the Leyba Grant?

A. I bought from an American there the right to mine, and I came to take Mr. White for the purpose of having some surveying, and when he arrived at the place he told me that there was a grant which was called the Jose de Leyba Grant.

Q. Now when was that?

A. In the year 1896.

Q. What, if anything, did you do after you heard that there was a Leyba Grant down there?

A. I hunted up one of the heirs and I bought an interest in the grant.

Q. From whom did you buy that interest?

A. I bought it from Salvador Leyba. I gave him $175.00 for it.

Q. Did you take a deed from him?

A. Yes, sir.

Q. Have you got that deed?

A. Yes, sir. Here it is. (Witness here took deed from his pocket and handed same to counsel.)

Mr. DAVIS: I offer this deed in evidence. Marked Defendant's Exhibit No. 63.

Mr. REYNOLDS: The record can show that the deed is for an undivided ½ interest in the Leyba Grant for $175.00.

Mr. DAVIS:

Q. Were you ever acquainted with a man named Jesus Narvais?

A. I knew some people by the name of Narvais, but I don't remember his first name.

Q. Do you remember a man named Jesus Narvais, who testified in the hearing of the case of Mariano F. Sena vs. The United States, in the Court of Private Land Claims in 1900?

A. I am not certain. A man named Narvais worked with me on the Muniz mine.

Q. I mean an old man named Narvais who testified in that case?

A. I don't remember.

Cross-examination by H. S. CLANCY, Esq:

Q. When did you say that you first visited the Coyote Spring?

A. It was in about the year 1868. That was the second time I was there.

Q. I asked you for the first time you were there?

171 A. As I said before when I went with Mr. White in the year 1870, I heard it spoken of.

Q. You do not understand my question. When was the first time that you visited the Coyote Spring?

A. The first time I went with Mr. White I was not at the spring. I passed by the spring the second time.

Q. Is it not possible for you to answer a question? When was the first time that you visited the Coyote Spring?

A. In 1879.

Q. How many times have you visited the spring since 1879?

A. I did not visit the spring afterwards.

Q. You never have been to the Coyote Spring but once then?

A. Only once.

Q. You stated in your direct examination that you saw no evidences of habitations or ruins in the neighborhood of Ojo del Coyote?

A. When I went through there the first time I did not see anything.

Q. Did you ever go through there the second time?

A. Yes, sir.

Q. Didn't you state just now you never visited the spring but once?

A. Only one time. The first time I heard it spoken of——

Q. I am asking you about being actually on the ground, at the Ojo Coyote, where you could see the spring—I am not asking you what you heard about the spring.

A. I have never been at the spring, except to go through.

Q. And then only once?

A. Two times. One time I passed with a man coming from the Arroyo Galisteo, and the time I was with Mr. White I heard an old man speak about the Ojo Coyote.

Q. The second time did you see the spring—did you actually see the spring on two occasions?

A. I passed through there.

Q. Did you stop at the spring on those two occasions?

A. I did not stop at the spring neither time.

Q. You merely passed through there?

A. Only passed through.

Q. As I understand you then you have only seen Coyote Spring twice?

172 A. Yes, sir.

Q. And on those two occasions you merely passed through there and went by the spring, by the trail or wagon road without stopping at the spring?

A. Yes, sir. I went there with a wagon to sell fruit.

Q. And you were able to cross the arroyo at the spring with a wagon and horses?

A. There was a road there.

Q. That passes right by the spring as I understand you?

A. I crossed the Coyote and went to the San Marcos.

Q. How near is that road to the spring?

A. Which road?

Q. The road you have just spoken of?

A. That connects with the road that goes from here to Los Placers.

Q. How near is the road that you travelled there when you passed that spring, from the spring?

A. I crossed the Arroyo Coyote and the Ojo Coyote is above.

Q. How far from the spring?

A. It is near.

Q. Is it fifty feet away from the spring?

A. I could not tell you exactly how many feet or how many yards. I only saw it as I passed by.

Q. But the road is near enough to the spring for you to see the spring as you were passing by?

A. I saw water running in the arroyo and I believe it was from the Coyote Spring.

Q. You believe it was from Coyote Spring? Do you know it was the Coyote Spring?

A. I cannot tell exactly whether it is the Coyote Spring. It may have had another name at some time, but that is the name I heard it spoken of.

Q. Then the fact is that you don't know where the Ojo Coyote is?

A. That is the one I have heard called Ojo Coyote.

Q. Did you get out of the wagon on the two occasions when you passed by to get a drink of water?

A. One time I passed driving a "burro," and the other time I passed driving a wagon.

Q. I asked you if you stopped at the spring to get a drink of water?

173 A. No, sir, I just went right through.

Q. You testified that you did not see any ruins at that spring?

A. I did not see any ruins.

Q. Did you make any search for any ruins?

A. I did not have to look for them. That wasn't my business.

MICHAEL O'NEIL, recalled.

Direct examination by Mr. REYNOLDS:

Q. You have testified as to your familiarity with the mining claims involved in this suit, the Morning Star, the Muniz, the Gem, the Sky Blue, and the Castillian?

A. Yes, sir.

Q. Were you acquainted with the Castillian mining claim in the year 1885?

A. I was.

Q. I will ask you whether or not at that time there was any monuments on that mining claim?

A. Yes, the claim was monumented.

Q. How many mounments and where?

A. There were eight monuments—what it takes to stake out a regular mining claim.

Q. At what points on the claim were those monuments?

A. Three on the northeast end, and one on the middle in the west; three on the south end, and one on the east side, and the location post at the discovery shaft.

Q. How were the monuments located with reference to the corner of the claim?

A. One set at the north end corner; west side stake, southwest corner south end center southeast corner, east side center.

Q. Do you know whether or not there was any location notice posted up on that claim at any time?

A. Yes, sir.

Q. Did you see that in 1885?

A. I did. Yes, sir.

Q. Now as to the Muniz claim—what do you know about monuments on that claim?

A. I saw them when it was located.

Q. Was it monumented?

A. Yes, sir.

174 Q. In what way?

A. By putting up eight posts around the claim, the same as I have already testified about the other claims—staking it out and putting in eight monuments—that is what constitutes surveying a claim out—the way we speak of among miners.

Q. Now take the other three mining claims I have mentioned. What was the condition of those claims, when you saw them, as to whether there were monuments on them?

A. There were also monuments on them.

Q. In the same way you have already described as to the other claims?

A. Yes, sir.

Q. And with the location notices?

A. Yes, sir.

Q. Do you know whether or not those monuments on those various claims are still in existence, still standing?

A. Yes, sir. When I was doing my annual assessment last fall I saw them.

Q. What character of monuments were they?

A. They were piles of stones, some standing about that high (indicating two feet) and some a foot high and some higher.

Q. Were you at any time present at a meeting of the miners of Cerrillos Mining District when rules for that district were adopted?

A. I was at the meeting.

Q. When was that?

A. The 28th of March, 1879.

Q. Was there rules adopted at that meeting for the rules of miners in that district?
A. Yes, sir.
Q. Were those rules in writing?
A. Yes, sir.
Q. Who was the recorder, who had charge of the records?
A. Well, there has been a number of them since that time.
Q. Who was the last one that you know of?
A. Harvey Beckwith.
Q. Is he living or dead?
A. He is dead.
Q. Do you know where those records are now?
A. I believe they are in the recorder's office—if not—I
175 don't know where they are.
Q. I will ask you to state what your recollection is as to those rules.

Mr. CLANCY: We object on the ground their absence and loss is not sufficiently accounted for.

The COURT:

Q. Were you ever recorder there?
A. No, sir. Judge Laughlin was recorder there five years, when he lived there.

The COURT: I think I will let it in subject to proof by Judge Laughlin.
Mr. CLANCY: I will admit that Judge Laughlin was recorder there and that he cannot find the rules. I don't care to have him brought here.
The COURT: I think I will admit the testimony.
Exception reserved by plaintiff's counsel.
Mr. DAVIS: I would not put this evidence in, but it was plead in the answer that we had complied with the rules of the Cerrillos Mining District, and that is denied in the reply.
The COURT: You may proceed.

Mr. DAVIS to Witness:

Q. I will ask you to state in what respect, if any, these rules differ from the regulations laid down by the statutes of the United States?
A. Why here were three points that were about all that was of any note to the miners different from the United States mining laws, and the first was that they were to create a district down there for recording claims, for the convenience of the miners,—(secondly) In the monumenting of a claim it was cut down from 90 days to 10 days, as it is in the United States mining laws as I understand it, and thirdly, the first ten feet, the hole had to be sunk within 90 days, and then another point, the surface ground on the side was 600 feet in the United States statutes, it was cut down from 600 feet to 300 feet, making 150 feet on each side of the center line, and the length was the same in the district as in the United States law, namely, 1500 feet.

Q. You have already testified you were present at the time the Castillian and Muniz mine- were located, I will ask you whether or not to your knowledge the locators complied with the rules of that district as you have testified to, with regard to monumenting their claims, and doing what labor had to be done on them?

A. Yes, as far as I know they did.

176 Q. On each of them?

A. Yes, sir.

Q. Now in 1879 when you first went to that vicinity, what was the condition of the country just south of the place where these mines were located, as to whether or not there was a public road there?

A. No, there was no road there. There was a road afterwards made to the old mining camp known as Carbonateville on the south of the Old Turquoise mine. We used to haul water from the Spring of Bonanza to the mining camp of Carbonateville.

Q. When was that road built?

A. It was first used in the year 1879. It was just run from the Mesa, that is all the building there was to it.

Q. When did it first become defined as a road, become marked on the surface of the ground?

A. From 1879 on I would say.

Q. Prior to 1879, how far south of these Turquoise mines was the first road?

A. About 1000 feet.

Q. Is that the road that you have been speaking of?

A. Yes, sir, the Carbonateville camp was a dry camp and they had to haul their water from Bonanza.

Q. What was the condition at that time of the country to the east of the place where there Turquoise mines are now, as to whether or not there was a road?

A. There was an old road there to the east. It ran more to the east. It was called the old stage road.

Q. How far east of the mines was that?

A. It was north of the hills, probably 1000 or 1500 feet.

Q. And where did that road go?

A. Went up the Pecos and the Las Vegas country.

Q. Where did it go in the other direction?

A. To Albuquerque.

Q. Do you know a road that runs from Cienega to Galisteo at that time?

A. They traveled on this road a part of the time and branched off running south. I have seen an old road there. It is not much of a road, but there had been some travel over it when I come to that section of the country.

Cross-examination by H. S. CLANCY:

Q. What road is this you refer to as the stage road?

177 A. The road that is north of the old ruins of the Turquoise Hill.

Q. Don't you mean east of the Turquoise Hill?

A. Yes, I mean east—I am turned around. I mean to the east of the hills.

The COURT:

Q. When you said north, you were mistaken?
A. Yes, it was a mistake on my part.

Mr. CLANCY:

Q. Where does this stage road lead to and from what point?
A. It crosses the Mesa, wher- it goes to I don't know—they claim it runs to the Pecos.
Q. Did you ever travel the road?
A. I traveled it up to the Santa Fe Mountains for timber.
Q. Then the road does run towards the east, does it not?
A. I cannot say whether it runs exactly towards the east, but it runs in that neighborhood—may be northeast or east.
Q. I mean the road generally would be east and west?
A. As near as I can judge it is in that neighborhood. I never had a compass along.
Q. At what point did you strike this road in traveling to the mountains for wood?
A. It is right north of the hills where my camp was.
Q. Say how far from the hills to that road was it?
A. About 1000 or 1500 feet.
Q. And at the point where you strike that road, where does the road go from that point west?
A. Through Bonanza.
Q. And now leaving Bonanza and traveling east, how far did you travel on that road?
A. I went to the mountains up here.
Q. Is that not known as the old road that goes from Cerrillos to Pecos? You said a moment ago you understood this was the road that went to the Pecos?
A. Yes, sir, I understood so—but I don't know whether you mean the town of Cerrillos.
Q. From Bonanza. Cerrillos is the old name for it.
A. Then that is right.
Q. Is it not true it first became known as Bonanza in 1879 or 1880?
A. That is about the time.

Mr. REYNOLDS: I would suggest to the counsel and to the court, that I do not know whether to offer the pleadings in the case
178 of Sena vs. The United States, and the American Turquoise Company, and McNulty and others, for confirmation of this grant—and the answer—so as to show the issues in that case. My desire being to show that Mr. Sena is the same party who is party plaintiff in that case, and that The American Turquoise Company and McNulty are the same defendants.

Mr. CLANCY: I think they might be put into the record—they are not long.

Mr. REYNOLDS: Then I offer in evidence, the amended petition

of Mr. Sena, filed in the court of private land claims, and the answer of the United States. The answer of The American Turquoise Company, and the final decree of the court. That will fix the issues. The point I am after is to lay the foundation for the offering of the deposition of Nasario Gonzales, and Jesus Narvais.

Mr. CLANCY: I have no objection to that, but when you come to offer the deposition of Mr. Gonzales and Jesus Narvais, that is another matter.

The pleadings referred to were marked Defendant's Exhibit No. 64.

In the Court of Private Land Claims.

To the Honorable Court of Private Land Claims and the Chief Justice and Associate Justices thereof:

Your petitioner, Mariano F. Sena, resident of the City of Santa Fe, in the Territory of New Mexico, represents that he is the owner of that certain grant and tract of land lying and being situate in the county of Santa Fe, in the Territory of New Mexico, known and called by the name of the "Jose de Leyba Grant," and bounded and described as follows, to-wit:

On the east by the San Marcos road; on the south by an arroyo called Cuesta del Oregano; on the west by the lands of Juan Garcia de las Rivas, and on the north by the lands of Captain Sebastian de Vargas.

Said tract of land was granted to Jose de Leyba by the then King of Spain by Governor and Captain General Juan Domingo de Bustamente on the twenty-fifth day of May, in the year of our Lord 1728, and the grant papers for the same are in form of an absolute and perfect grant; the original papers of which said grant are now on file in the office of the Surveyor General of the Territory of New Mexico, and are not in the power, possession or control of
179 your petitioner, said original papers being identified as Archive 441.

Said land has never been officially surveyed and your petitioner does not know the area thereof, but he has filed with his original petition herein a sketch map of the same, showing approximately the shape of said land and its location as far as possible; but the exact area and location and shape cannot be stated or ascertained until a survey thereof shall be made.

Your petitioner claims said land by conveyance from the heirs and assigns of the original grantee.

Your petitioner states that since the filing of his original petition herein, he has been informed that the owners of Los Cerrillos Grant, the same being a confirmed grant and numbered seventy-eight of the docket of this court, J. P. McNulty, L. Bradford Prince, Thomas Whalen, Samuel Brommagen, Thomas Moore, Jr., Diego Mares, Bernard Carrol, Otto Ziegler, Albert Geyer, M. J. O'Neill, Julian Padia, Pedro Muniz and The American Turquoise Company claim adverse possession to real estate included within the said Jose de Leyba grant otherwise than by the lease or permission of your pe-

titioner, and he therefore makes said parties and company parties defendant to this amended petition, and asks that proper process issue for service on them.

Said claim to said land has not been confirmed nor has it been considered or acted upon by Congress or any other authorities constituted or acted upon by Congress or any other authorities constituted by law for the adjustment of land titles in the limits of said Territory of New Mexico as acquired.

Your petitioner therefore prays that the validity of such title and claim and of said grant may be inquired into and decided by this Honorable Court and the same confirmed to your petitioner and the other heirs and assigns of said original grantee, and that he may have such other and further relief as the nature of the case requires and to your Honors may appear meet and proper.

F. W. CLANCY,
H. S. CLANCY,
Attorneys for Petitioner.

180 In the U. S. Court of Private Land Claims for the District of New Mexico.

General No. 278.

MARIANO F. SENA
vs.
THE UNITED STATES, THE AMERICAN TURQUOISE COMPANY, and J. P. MCNULTY et al.

Now comes the above named defendants, The American Turquoise Company and J. P. McNulty by Edward L. Bartlett, their attorney, and for their answer to the petition of the plaintiff filed herein deny that the said petitioner Mariano F. Sena is the owner of that certain land grant and tract lying and being situate in the county of Santa Fe in the Territory of New Mexico, known and called by the name of the "Jose de Leyba Grant" by the boundaries therein set out.

They deny that said tract of land was granted to Jose de Leyba by the then King of Spain by Governor and Captain General Juan Domingo Bustamante on the 25th day of May, in the year A. D. 1728, or at any other time. And they deny that the granting papers for the same are in the form of an absolute and perfect grant.

And said defendants deny that said land has never been officially surveyed, but state the fact to be that a very large portion if not all of said described land has been officially surveyed under the direction of the United States as public land of the United States under the direction of the Surveyor General of New Mexico, and for twenty years last past has been recognized by the United States and in its land office as such public land.

And said defendants deny that they claim adverse possession to real estate included within the said Jose de Leyba grant, otherwise than by the lease or permission of said petitioner, but they state to

the court that they are now and have been for many years last past in the actual, exclusive, open and notorious possession of five mining claims with a superficial area of about one hundred acres of land in the southern part of Santa Fe county just north of "Los Cerrillos" confirmed grant referred to in plaintiff's petition; that they have continuously worked and operated said mining claims which are located under the mining laws of the United States and the Territory of New Mexico and the rules and regulations of the United States in said Territory, and have the final receipt for a patent to one of said mining claims, under proceedings to obtain a
181 patent therefor; that they have paid the taxes levied and assessed against the said property, and that they and their grantees have enjoyed the exclusive, undisturbed and quiet possession of the same for more than ten years last past.

Said defendants therefore pray that the proof of the denials and allegations contained in this their answer may be inquired of by the court.

THE AMERICAN TURQUOISE COMPANY,
AND J. P. McNULTY,
By EDWARD L. BARLETT, *Their Attorney.*

UNITED STATES OF AMERICA, *ss:*

No. 278.

In the Court of Private Land Claims, Santa Fe District.

MARIANO F. SENA, Complainant,
vs.
UNITED STATES, Defendant.

Jose de Leyba Grant.

Now comes the United States by its attorney, Matt G. Reynolds, and for answer to the petition and amended petition filed in the above entitled cause, says:

That it is not true, as alleged in said petition, that plaintiff is the owner of that certain tract of land described in said petition, or any part thereof.

That it is not true that the tract of land described in the said petition was granted to Jose de Leyba by the then King of Spain by Governor and Captain General Juan Domingo Bustamante, on the 25th day of May, A. D. 1728; and it is not true that the granting papers for the same set forth and described in plaintiff's petition, are in the form of and constitute an absolute and perfect grant.

Defendants admits that said land has never been officially surveyed and denies that such sketch map filed by the petitioner, correctly shows the shape of said land and its location, but on the contrary alleges that if any grant was ever made as alleged in plaintiff's petition and amended petition, the same was located in a manner very different from that set forth in said sketch map, and cov-

ered no portion of the premises indicated in said petition and sketch map.

Defendant further shows that said petition was not filed within two years from March 3rd, 1891, as provided by the act establishing the Court of Private Land Claims, and the claim mentioned in said petition consequently became and was abandoned and for-
182 ever barred at the expiration of two years. Defendant pleads said limitation in bar of the claim herein presented.

That as to the several other matters and things alleged in said petition, defendant has not knowledge or information to enable it to form a belief as to the truth thereof, and it accordingly denies each and all of said allegations and prays that complainant be put to the proof of the same, as is provided by the act establishing this court.

And this defendant, further answering, denies that the complainant is entitled to the relief or any part thereof in said petition alleged and prayed for, and prays the same advantage of this answer as if it had pleaded or demurred to said petition.

Now having fully answered, it prays the court that a decree may be entered rejecting the claim of said alleged grant and dismissing the petition, and for such other orders as to the court shall seem meet and proper and which it may be authorized to make in the premises.

MATT G. REYNOLDS,
U. S. Attorney, C. P. L. C.

In the U. S. Court of Private Land Claims, Santa Fe, New Mexico, April Term, 1900.

No. 278.

MARIANO F. SENA
vs.
UNITED STATES.

Jose de Leyba Grant.

The title papers and documents produced from the archives of the Surveyor General's Office and received in evidence in this case show that the grant in question was made to Jose de Leyba by the Governor and Captain General Bustamante, in the name of the King of Spain in the year 1728, and that possession was formally given to the grantee of the land petitioned for and granted.

The evidence as to settlement and occupation of the tract purported to have been granted, continuity of possession, cultivation, residence, improvement, claim of ownership, notoriety of the grant, and knowledge of its existence in the community by the oldest inhabitants now living, is so vague, contradictory, and uncertain as to be almost wholly wanting.

The question of boundaries of the tract claimed was one of serious contention upon the hearing of the case, involving as it does the

patent titles and other conflicting interests of adverse claimants to lands embraced within the boundaries claimed under the grant title.

183 Upon consideration of the state of facts presented, the court has reached the conclusion which may be briefly stated. The first question arising is, What is the character of this grant, whether perfect or imperfect? It is claimed by petitioner to be a perfect grant, and therefore could be brought into this court at any time, or not at all, under the statute. Inasmuch as the grant was made at the date mentioned 1728, it falls under the requirements of the Royal Ordinance of 1754, which provides that all grants made subsequent to 1700, unless already confirmed by Royal order of the King or his viceroys, or Presidents of the Audiencias of the several districts embracing the lands granted, should apply for such confirmation as a prerequisite to validity. There is not evidence in this case, either by the documents or otherwise, that this requirement of the ordinance of 1754 were ever complied with. Nor is there in the nature of the case or upon any of the facts in evidence any ground that will justify a presumption of such compliance with the requirement for such confirmation. It therefore follows that this grant must be held to be not a perfect, but an imperfect grant. And as such imperfect grant, it is sub-ect to the provision of the act creating this court, requiring the petition for confirmation herein to be filed within two years, but since this case was not brought or filed in this court until the present year, we must hold that it is barred by the statute of limitations, and hence must dismiss the case for want of jurisdiction under the said statute.

WILBUR F. STONE,
Associate Justice.

Mr. REYNOLDS: I now offer in evidence the notice in that case of Sena vs. The United States, The American Turquoise Company and J. P. McNulty, the application and notice. The notice to counsel for Mr. Sena to take the deposition before the Hon. Edward F. Stone, one of the associate justices of the court of private land claims, of Nasario Gonzales, Francisco Romero, Francisco Bustamante, Antonio Bustamante, Jesus Narvais, Jose Duran, or Benevidez, and Eligio Sedillo, signed by the United States attorney for the government, and Edward L. Bartlett, counsel for J. P. McNulty, and The American Turquoise Company. That notice contains an affidavit of Francisco Delgado of service of notice upon H. S. Clancy, one of the counsel for Sena, and there is the application to

184 Judge Stone, signed by the same counsel, for an order to take the testimony in February. The application is signed by Edward L. Bartlett, who appears for The American Turquoise Company and J. P. McNulty. Then follows the order of Wilbur F. Stone, of the court of private land claims, ordering the taking of the testimony on the 23rd of February at ten o'clock a. m., in the Federal building at Santa Fe, New Mexico.

I then offer the testimony taken before the Hon. Wilbur F. Stone, Associate Justice of the Court of Private Land Claims, of Nasario Gonzales, whose death has been shown.

Mr. F. W. CLANCY: I will admit that Jesus Narvais is dead.

Mr. REYNOLDS: I offer in evidence the deposition in that case of Nasario Gonzales and Jesus Narvais.

Mr. CLANCY: The general objection which I will have to make first is, that this is in direct defiance of the ruling of this court upon the demurrers to the replication. The demurrers insisted that the action in the court of private land claims was not for the recovery of this property, or of the same nature or character, or the same parties, and the court sustained that demurrer. My position was on the argument of the demurrer and is now, that this was an action between the same parties, and of the same character, and therefore anything of this kind would be admissible, but the court has ruled exactly opposite in this case, and I am compelled to object on that ground.

Mr. CLANCY: There is a further objection which I desire to make, and that is it is not shown that these depositions were properly admissible in the former suit and in the court of private land claims, because it does not appear from anything that has been put in evidence, that the witnesses were not available, or even in attendance, at the time of the trial in the court of private land claims. What I shall do, if the court requires it, unless counsel will admit it,—I would have to submit evidence to show that these witnesses were in attendance on the court at that time.

Mr. REYNOLDS: Yes, I have no objection to that. They were in the court room, or they were in the city of Santa Fe and could have been reached at any time.

Objection overruled by the court.

Exception reserved by Mr. Clancy, attorney for plaintiff.

Mr. Davis here read to the court and jury, the deposition
185 of Nasario Gonzales, which was marked Defendant's Exhibit No. 65.

Mr. Davis here read to the court and jury the deposition of Jesus Narvais, which was marked Defendant's Exhibit No. 66. Defendant's Exhibit No. 66, which said depositions are as follows:

In the United States Court of Private Land Claims, Santa Fe, New Mexico.

No. 278.

MARIANO F. SENA
vs.
UNITED STATES.

Jose de Leyba Grant.

Depositions taken in the above entitled case in the Federal building on behalf of the Government, Santa Fe, New Mexico, on Friday, February 23rd, 1900, before Hon. Wilbur F. Stone, an associate justice of said court.

Appearances:

Mr. W. H. Pope, assistant United States attorney, appeared for the government.

Mr. Edward L. Bartlett, appeared for The American Turquoise Company.

No counsel appeared for the plaintiff.

NASARIO GONZALES, sworn on the part of the government testified upon direct examination by Mr. Pope, as follows:

Q. State your name, age and residence?

A. My name is Nasario Gonzales; I am 83 years old, I reside in Precinct No. 6, County of Santa Fe, New Mexico.

Q. What is the name of the settlement in which you live?

A. La Cienega.

Q. Where were you born?

A. In Bernalillo.

Q. How long have you lived at La Cienega?

A. Fifty-four years.

Q. You moved from Bernalillo to Cienega, did you?

A. Yes, sir.

Q. And have you lived there ever since?

A. Yes, sir.

Q. Have you a ranch there?

A. Yes, sir.

Q. What has been your business in life since you have lived in Cienega?

A. It has been in various lines; I have been farmer and stock-raiser, and I have been a merchant.

186 Q. Have you ever held any official positions in this county?

A. Yes, sir.

Q. I will get you to state what they were?

A. I have been three terms senator from the county of Santa Fe in the legislature. I have been county commissioner.

Q. Do you know a place called the old pueblo of San Marcos?

A. Yes, sir.

Q. I will get you to state to what extent you are acquainted with the count-y between San Marcos on the south and Balisteo?

A. Fifty years.

Q. Are you well, or otherwise, acquainted with that section of the country?

A. I am familiar with the land; I have been for 40 years the owner of the grant of the Spring of San Marcos.

Q. And you are acquainted, you said, with the country in between the Spring of San Marcos and your ranch at Cienega?

A. Yes, sir. And I have been the owner of the Spring of San Marcos, of the grant of the Spring of San Marcos.

Q. Do you know the place down there that is now held by the Turquoise Company, Mr. McNulty, and The American Turquoise Company?

A. Yes, sir.

Q. How long have you known that place where the Turquoise mine is now?

A. Ever since the time during the period of fifty and odd years.

Q. Did you ever have occasion to travel over that section of the country much during the said fifty years?

A. Yes, sir.

Q. Have you ever had flocks that you pastured down there during that time?

A. For forty years I have had my ranch at the Spring of San Marcos, and had my cattle and sheep and horses there.

Q. And that country north of San Marcos, around the Turquoise mine; have you ever pastured there around that section?

A. Yes, sir, always; they are at the same place.

Q. Since you have been living down there at Cienega, dur-
187 ing these forty or fifty years, have you ever heard in that vicinity of a grant called the Jose de Leyba grant?

A. No, sir.

Q. Have you ever heard anyone down there, or anywhere else, claiming a grant called the Jose de Leyba grant?

A. Never; not of my own knowledge, nor by tradition, have I ever heard about this.

Q. Have you made any inquiry about it at any time?

A. I have seen many title papers, and my father-in-law was a very well informed man, and he never told me about this anything.

Q. During that time that you have lived down there, have anyone ever occupied this land around that Turquoise mine, and between Cienega on the north and San Marcos on the south?

A. No, sir. Nobody has been there outside of the Turquoise mine people; and now, in these last few years, one Pedro Mares and one Thomas made some entries there.

Q. Some entries down here in the United States land office?

A. I think so; they have their houses and they have plowed lands there.

Q. Before these people came, who made these entries, was anyone at any time occupying that land?

A. No, sir; never.

Q. Since you have been down there, from the very earliest time, has anyone ever occupied that land, claiming it under a grant called the Jose de Leyba grant?

A. Never; I have never heard anything about such a person as Jose de Leyba.

Q. Have you ever heard anything of anyone of late around there claiming under a grant made by Jose de Leyba, within the last year or two?

A. No, sir; nothing.

Q. Look at this map, which is a map of the grant attached to the petition, for the land that is claimed in this case.

A. I have very little knowledge about maps.

Q. I will explain the map to you: here is the San Marcos road, on the east of the tract of land that is claimed; here is the Arroyo de la Piedra on the south, and Coyote Springs; here are the lands of the Cerrillos tract, and the Cienega tract on the west; and on the
188 north is the road from the Pecos to Cerrillos. Ask him if he knows all these points that I have named?

A. Yes, sir.

Q. And do you know the land that is included within these points that I have mentioned?

A. Yes, sir.

Q. And are these the lands that you say you have known for fifty or more years?

A. Yes, sir.

Q. And are these the lands on which you say you pastured?

A. Yes, sir. I have said upon the grant of San Marcos, and upon all of that land.

Q. Nobody ever objected to your using it for pasture?

A. No, sir. I used that land with the same freedom as I used my own.

Q. Did other people pasture on it, too?

A. Yes, sir.

Q. Did any of these people that pastured on it, claim it under the Jose de Leyba grant?

A. No, sir.

Q. Did they claim it under any grant?

A. No, sir; it was never known.

Q. Now, when you went to that country, were there any ruins of houses, or any other ruins, within this tract now claimed as the Jose de Leyba grant, with the exception of the pueblo of San Marcos?

A. The pueblo of San Marcos is not on this grant, as they claim it.

Q. That is a separate grant, and it is south of this grant?

A. Yes, sir. I do not know where that tract is that they are claiming under that grant.

Q. I mean where I have shown you in this map here?

A. I understand.

Q. Are there any old ruins now down on this land?

A. There are no other ruins there, except the ruins of some huts

that were built there by Jesus Narvais, who had constructed these huts for the use of his sons who were herding some sheep there.

Q. Do you remember when these huts were built?

A. Yes, sir.

Q. Is Jesus Narvais here today?

189 A. He is coming.

Q. Do you know where the Arroyo de la Piedra is?

A. Yes, sir.

Q. Where are these old huts with respect to that arroyo?

A. The Arroyo de la Piedra comes this way, and the Arroyo del Coyote comes down and empties into it on the south of the Arroyo de la Piedra; and that Arroyo de la Piedra is within the grant of San Marcos.

Q. That San Marcos grant was presented to the Court of Private Land Claims, was it not?

A. Yes, sir, it is already confirmed.

Q. You were plaintiff in that case, were you not?

A. No, sir. I sold it.

Q. Where were these old huts of Jesus Narvais, with regard to the Arroyo de la Piedra and the Coyote Arroyo, right at the Springs of Coyote?

A. Yes, sir.

Q. How long ago was it, that these huts were built?

A. About more or less, I do not think that they were built for over 20 years, more or less.

Q. Before these were built, were there any ruins of any kind, at or near the Coyote Springs?

A. Nothing.

Q. Were there any ruins of any kind, inside of this tract represented on the map I have shown you?

A. There never have been, and there are none today.

Q. Did you ever hear of an arroyo down there, near the Coyote Springs, or the Arroyo de la Piedra, called the Arroyo del Oregano?

A. I have never heard the name of Oregano Arroyo mentioned.

Q. Have you ever heard of any such Arroyo del Oregano anywhere in that section of the country within miles of the Turquoise mines?

A. No, sir, never.

Q. Did you ever hear of the Cuesta del Oregano de Organo, down in the vicinity of the Turquoise mine, or between the Turquoise mine and San Marcos?

A. No, sir, never; there is nothing; there is not even a slope there; a cuesta I call a place where you go up the slope, but there is no cuesta down there; there is nothing.

190 Q. Did you ever hear of an arroyo called the Arroyo del Cuesta?

A. There is nothing; nothing of that kind down in that section of the country at all; there is nothing.

Q. Did you ever hear down in that section of the country of lands called the lands of Juan Garcia de las Rivas?

A. No, sir.

Q. Did you ever hear of the lands of Cienega, where you live called the lands of Juan Garcia de las Rivas?

A. No, sir. I have numerous papers, very old papers, as far back as the conquest among them, and I did not find a single paper that mentioned any Garcia.

Q. Any Garcia de las Rivas?

A. No, sir.

Q. These papers to which you refer, did they relate to the lands of Cienega?

A. The lands of La Cienega.

Q. Do you know a road from Pecos to Cerrillos, coming south of the lands of Cienega?

A. I know a trail that I have known there ever since I came to that locality, that comes out down above Los Tanques goes to Galisteo, and I have known no other.

Q. Does that road or trail run to the old Mexican settlement of Los Cerrillos, and Bonanza?

A. No, sir. This trail that I am referring to now comes out from the little town of Los Tanques, which is the oldest settlement to the north of the lands of La Cienega.

Q. East of Cienega, where you live, have you ever heard of any lands of Sebastian de Vargas?

A. No, sir. I think they lie here, close to the hills there used to be a grant called Sebastian de Vargas grant.

Q. These lands of Sebastian de Vargas lie east of the Camino del Medio, do they not?

A. East of the Camino del Medio.

Q. Have you ever heard of the lands of Sebastian de Vargas west of that grant?

A. No, sir.

Q. How far is that Camino de en Medio from Cienega?

A. It may be from 12 to 14 miles, more or less.

Q. That is the road from Santa Fe to Galisteo, is it, the Camino de en Medio?

A. Yes, sir. There are two roads, the best traveled road
191 goes below the middle road.

Q. The Camino de en Medio comes from the direction of San Cristobal towards Santa Fe, and comes into the road that goes to Galisteo?

A. It comes into this road going from Santa Fe to Galisteo at the Arroyo Hondo.

Q. Do you know the old road running from Cienega to Galisteo?

A. The only road that has been there is that trail that I have mentioned a while ago. Afterwards I used to have lands at Galisteo and I used to raise considerable crops, and I made a road over that same trail.

Q. And that was the first wagon road from Cienega to Galisteo, was it not?

A. Yes, sir.

Q. How does that road run with respect to the direction in which

the Turquoise mine and Mr. McNulty's mines are located, east or west?

A. To the north; it goes by that hill going to Galisteo.

Q. Does it go to the sunrise or to the sunset from that hill?

A. Towards the sunrise.

Q. Is there any old road from Cienega to Galisteo, west or to the sunset, from the Cerro on which these Turquoise mines are located?

A. There is a road that I made with my own wagon, going to La Baca on the Arroyo Galisteo, and that is the way people call it the road of Nasario Gonzales.

Q. Before you built that road, was there any road there?

A. No, sir. There were trails made by cattle coming for water at Cerrillos.

Q. But the old trail was traveled by people going to Galisteo, was on the east?

A. Yes, sir, very far from it.

Q. Within this tract, the map of which I have shown you, is there any monte?

A. There are very few spruce trees.

Q. There is no timber, or any monte or any woods, to any considerable extent?

A. There are a few spruce trees; there has never been any timber.

Q. Is it or is it not true, that most of that country is a bare, level plain?

192 A. Yes, sir.

Q. Within this tract, as claimed, that I have shown you and a map of it, what water is there?

A. None.

Q. What about this Coyote Spring that you have mentioned?

A. The waters of Coyote Springs are within the grant of San Marcos. The water in the Arroyo de la Piedra is also within the grant of San Marcos.

Q. How much of a spring is the Coyote Spring?

A. Very little water; it comes out from a rock, and gushes out from the rock and makes little pools, and the stock drink it.

Q. Is there enough water there to plant corn?

A. No, sir, nothing.

Q. Is there within this tract any evidences of any land having been cultivated in the past?

A. No, sir.

Q. When you went there, was there any evidence of any land having been planted?

A. No, sir.

Q. Around near this Coyote Spring, or anywhere on this tract?

A. No, sir, nothing.

Q. What is the southern line of the land of the Cienega on the south?

A. The south boundary line is Los Cerrillos.

Q. The grant of Los Cerrillos?

A. Yes, sir. The north boundary line of the grant of Los Cerrillos is the south boundary line of La Cienega.

Q. What natural object is there that divides it?

A. It is a hill, a ridge that washes it towards Cerrillos and towards La Cienega.

Q. Is there any high hill down there?

A. There is a mountain or peak.

Q. The cerro that divides them is right at the center of the divide, as you cross on the top?

A. Yes, sir.

Q. Were there any old people living at Cienega, when you first went there?

A. Ever since the time of the conquest.

Q. Did you ever talk with them about the natural objects
193 around there, and the old grants around there, and things of that kind?

A. Yes, sir. It is natural to talk about everything, and I had friendly relations with all old people there.

Q. And you say you never heard from any of them at any time anything about a grant called the Jose de Leyba grant?

A. Never.

Q. Did you ever hear from them anything as to the Sitio of the Cienega tract?

A. Yes, sir.

Q. Who did you understand that sitio was given to?

A. From some of the old title papers, it appears that the title to the land was granted to Puan Pais Hurtado, and from this Juan Pais Hurtado it was transferred to Manuel Tenorio de Alva.

Q. Did you ever hear anything about Juan Garcia de las Rivas ever having anything to do with the sitio de Cienega?

A. I never heard that said, and there is no papers that shows that fact.

Q. Do you know anything about an old will in connection with this Cienega tract?

A. Yes, sir, I know. Manuel Tenorio de Alva's will. I have it myself.

Q. Have you it here?

A. No, sir. I did not know to have it here.

Q. Is it registered in the probate clerk's office of this county?

A. I believe it is.

Q. I will get you to state whether it is possible to cultivate any portion of the land included within this tract, the map of which I have shown you, attached to plaintiff's petition in this case.

Q. Yes, sir. It is possible, but without water.

Q. You have to depend on rains?

A. Yes, sir.

JESUS NARVAIS, sworn on the part of the government, testified upon direct examination by Mr. POPE as follows:

Q. State your name, age and residence?

A. My name is Jesus Narvais; I was born in 1819.

Q. Where were you born?

A. I was born in Cochiti.

Q. Where do you live now?

194 A. At La Cienega.

Q. How long have you lived at La Cienega?

A. For many years; that is, almost all my life.

Q. How old were you when you went there to live?

A. I was ten years old. My mother had been born at that place, and my grandfather.

Q. Did you know that place La Cienega before you went there to live?

A. Yes, sir, my mother used to be from that place, but my mother had been married to a man who had been brought up by a Spanish priest.

Q. Have you lived any at Pino's ranch?

A. Yes, sir.

Q. How far is that from Don Nasario Gonzales' house, the witness who has just testified?

A. About a mile.

Q. That is in what is called La Cienega, is it?

A. Yes, sir.

Q. What has been your occupation in life?

A. A farmer. At the present time I have no occupation, because I am very old.

Q. Have you ever been engaged in stock raising?

A. Yes, sir. My own, some few cows.

Q. Do you know where the pueblo of San Marcos is?

A. Yes, sir.

Q. Do you know where the road of San Marcos is?

A. I do not know which road that is, but I know the old road that comes from the side of these little hills.

Q. The old road from Santa Fe to San Marcos, on the east from the Turquoise mine?

A. I do not know which one the old road was. I know this road, because there is no other road.

Q. Do you know where the American Turquoise mine and Mr. McNulty's mine are located?

A. Yes, sir.

Q. Is that the place called Cerro Palado?

A. Yes, sir.

Q. Do you know where the old road from Cienega to Galisteo ran, when you first went to that country?

A. I think it is the road that comes there to the other side of the hill; that old road that goes to the other side of the hill.

195 Q. Does it run to the sunrise side or the sunset side of this Cerro Pelado on which Mr. McNulty's mines are located?

A. Towards the sun rise.

Q. Is there a road running there now, from La Cienega to Galisteo on the west side of that hill?

A. Yes, sir.

Q. Who built that road?

A. I believe Don Nasario Gonzales did.

Q. Was there any old road there on that side, prior to that time?

A. There was another road a little further to the north; I think there was an old road.

Q. Where did that go to, and from where?

A. To Galisteo from La Cienega.

Q. Can you read and write?

A. No, sir. I never had any opportunity to learn how to read or write.

Q. Are you acquainted with the section of country around northwest from the pueblo of San Marcos, and the Arroyo de la Piedra, for six or seven miles?

A. I know that land.

Q. How long have you known them?

A. About 20 or 25 years that I have known it well.

Q. Did you ever pasture on these lands?

A. Yes, sir. I was there; I used to have my little children there at the place called Ojo Spring.

Q. Do you know where the Arroyo de la Piedra is?

A. Yes, sir.

Q. Are there any ruins of houses, or any ruins of any kind on that land?

A. I never knew ruins of any kind; a little above the spring on a little hill I myself constructed a very small hut there, for my sons.

Q. Is that in ruins now?

A. I think it is there yet. I have not been there since.

Q. Were there any ruins of houses, or anything to show that houses had ever been around in the neighborhood of Coyote Springs, before you built?

A. No, sir, I do not think anybody would have considered it, because it is not a land for cultivation, for farming.

Q. Why is it not a land for cultivation?

A. Because it is a very hilly, unless it is a little above the
196 spring at Coyote, towards the little valley where Mr. Thomas has a ranch, and also a son-in-law of mine, Diego Mares.

Q. What about water; is there any water there?

A. They have a well. They made a well. Thomas made one and my son-in-law made two wells.

Q. Outside of the wells, is there any water there for cultivation?

A. Outside of the wells there is no water, with the exception of the little spring of Coyote.

Q. How much, if any, can be cultivated from the water of the Coyote Spring?

A. Nothing; there is scarcely enough for the stock.

Q. What about timber around there, on this tract, from the Coyote Spring, north, and around there?

A. There is only scrubby bushes and these sage bushes, and a few spruce trees.

Q. Most of the country is bare, is it not?

A. Yes, sir. A plain, almost all of it.

Q. Since you have been living there, have you ever heard of a grant in that vicinity from the Coyote Spring north to the Turquoise

Mine, and up towards Cienega and Pino's ranch, called the Jose de Leyba grant?

A. I have not known it; very recently I heard statements to that effect, but very little of it.

Q. Did you ever hear anyone claiming land down there as the Jose de Leyba grant?

A. No, sir.

Q At any time?

A. No, sir, never at no time.

Q. When you went there, was anybody occupying that land?

A. No, sir.

Q. When you pastured on that land, did anyone ever object to your using it for pasturage, claiming it as the Jose de Leyba grant?

A. Nobody. I had not heard that name mentioned until very recently.

Q. Did anyone else pasture on that land besides yourself?

A. Yes, sir; several persons.

Q. Who did?

A. Don Nasario Gonzales, and his brothers-inlaw, Don Jose Baca and Don Manuel Baca, and various other persons.

197 Q. Did they claim the land?

A. No, sir.

Q. It was common pasturage ground, was it, or not?

A. It was so recognized; it was so called.

Q. Do you know where the Arroyo de la Piedra is?

A. Yes, sir.

Q. You have been to the San Marcos Spring, have you, a number of times?

A. Yes, sir.

Q. And to Galisteo?

A. Yes, sir.

Q. You say you live at Coyote Spring?

A. Yes, sir. That is, I had my herd of cattle there, or cows; I do not live there; I was there during the summer.

Q. Do you know an arroyo that is called the Arroyo del Coyote?

A. Yes, sir.

Q. Now, have you ever heard of an arroyo called the Arroyo del Oregano?

A. No, sir.

Q. Or of a cuesta called the Cuesta de Oregano?

A. I never heard that name.

Q. Or an arroyo called the Arroyo of the Cuesta del Oregano?

A. Neither.

Q. Did you ever talk with the old people when you first went to that country, about the lands, or about the natural objects?

A. No, sir.

Q. Did you at any time ever hear the old people speak of the place called the Cuesta de Oregano?

A. I have not even heard that name.

Q. Did you ever hear of the lands of Juan Garcia de las Rivas in that vicinity?

A. No, sir.

Q. At or near La Cienega, did you ever hear of any such man?

A. No, sir.

Q. Did you ever hear it said that the lands of Cienega were the lands of Juan Garcia de las Rivas?

A. They might have been, but I was not informed as to that.

198 Q. Did you ever hear of the lands of Sebastian de Vargas down there near the lands of Cienega?

A. Yes, sir. I heard about this.

Q. Where are they?

A. They are at La Cienega.

Q. In the sitio of La Cienega?

A. I think so.

Q. Did you ever hear of any lands of Sebastian de Vargas east of the sitio of La Cienega?

A. Yes, sir. I do not understand very much about these matters.

Q. Do you know where these lands are?

A. They used to say that they are at Los Alamos, or at La Cienega, I think is what I am informed.

Q. Los Alamos is at the ranch of Mr. Lamy, is it not?

A. Yes, sir.

Q. Do you know an arroyo called the Arroyo Gallinas?

A. Yes, sir.

Q. The Canada de Galisteo, is that the same as the Arroyo de la Piedra?

A. Yes, sir.

Q. Do you know how far the lands of the Cienega extend east?

A. No, sir, I am not informed as to that.

Q. Did you ever hear from the old people anything about Don Francisco Baca y Torres?

A. Yes, sir, he used to talk about the lands. But I did not have very much conversation with him.

Q. You have no recollection of his having stated about the lands of the Cienega extending east of the Camino de en Medio?

A. I only knew that middle road coming from the place called Las Bocas.

Mr. REYNOLDS: We desire now to offer in evidence, the petition and the grant papers and decree. The plat under the decree of confirmation—the approved plat of the Los Cerrillos Grant.

The object and purpose of that is to show that this Los Cerrillos grant, the patented portion under confirmation by the court of private land claims, traces the south line somewhat north of the original claimed line at the time it was filed in the surveyor general's office, under the act of 1854.

199 Mr. CLANCY: I think it is immaterial, but I don't know as I have any objection to it.

The documents offered were here marked Defendant's Exhibit No. 67.

In the Court of Private Land Claims, Sitting in the Territory of New Mexico, at the City of Santa Fe.

BEATRIZ PEREA DE ARMIJO
vs.
UNITED STATES.

To the honorable chief justice and associate justices of the Court of Private Land Claims.

Your petitioner, Beatriz Perea de Armijo, a resident of the county of Bernalillo, in the Territory of New Mexico, respectfully shows to the court:

1. In the year 1788 Jose Miguel de la Pena presented a petition to Fernando de la Concha, then civil and military governor of the province of New Mexico, setting forth that he had registered a piece of land situate in the place called Los Cerrillos, which belonged to Alonzo Rael de Aguilar, the grandfather of his wife, Maria Rael, and that it had been abandoned for many years and that said Alonzo had lost the right which he had had, and the said Pena therefore asked of the governor that said land be given to him for himself, his children and heirs. On the 20th of April, 1788, the said governor certified that he had visited the tract of land and placed the petitioner and other heirs of Alonzo Rael de Aguilar in possession thereof and directed that the proper documents should be made in his favor by the chief alcalde of Santa Fe, Antonio Jose Ortiz. On the 12th day of June, 1788, Antonio Jose Ortiz, chief alcalde of Santa Fe, in obedience to the order aforesaid of the governor, proceeded to the land in question and notwithstanding that the petitioner had been placed in possession by the governor, he proceeded to deliver formal juridical possession of the land to the said Jose Miguel de la Pena, and designated the boundaries of the tract, which were, on the north, the boundaries of the Canada de Guicu and lands of the Bacas; on the south, the high hills; on the east, the road which goes to Galisteo, and declared that said tract measured from east to west, 2500 varas, and was divided in three parts, one of which was assigned to the said Jose Miguel de la Pena, on the western side, adjoining the land of Cleto Miera, and on the east adjoining the lands of the heirs of Antonia Teresa
200 Rael de Aguilar; all of which proceedings by said alcalde appear in the act of juridical possession, duly signed by him. The said petition of Jose Miguel de la Pena, the certificate of the governor and the act of juridical possession are on file in the office of the surveyor general of New Mexico, reported No. 59, but copies and translations thereof in duplicate are filed herewith and are hereby made a part of this petition.

2. The lands embraced within the boundaries hereinbefore referred to, have been, as your petitioner is informed and believes, in the possession of the heirs and legal representatives of the Jose Miguel de la Pena from the time of the making of said grant in 1788, down to the present time, and there are no persons now in

possession of the same or any part thereof, otherwise than by the lease or permission of your petitioner, but your petitioner is informed and believes that John Gwyn and Robert B. Willison, both residents of said county of Santa Fe in the Territory of New Mexico, make claim to a part of said land. It appears from the records of the office of the surveyor general that said Gwyn and Willison were making said claim more than twenty years ago, but they have not been in possession of any portion of said land under said claim, and your petitioner charges that if they ever had any right to any portion of said land, which he denies, it has been forever lost and barred by the operation of the statute of limitation.

A claim of said grant was submitted to the surveyor general for New Mexico in the year 1871, and that officer on the 31st of January, 1872, made his report thereon, and recommended the same to congress for confirmation, but the said claim has never been acted upon by congress.

The said land is situate in the county of Santa Fe and its boundaries are as set forth in the first paragraph of this petition. The quantity of land contained therein according to a survey thereof made under the direction of the surveyor general for New Mexico is 2284.41 acres, and a map thereof showing the same is filed herewith in accordance with the requirements of the statute. This petitioner avers that the title to said land hereinbefore set out was complete and perfect at the date when the United States acquired sovereignty over the country embraced within the present Territory of New Mexico, and she is the legal successor in interest in part of the rights of the original grantee.

Your petitioner therefore prays that the validity of such
201 title and claim may be inquired into and decided by this court in accordance with the provisions of the statute of the United States.

BEATRIZ PEREA DE ARMIJO,
Petitioner.
F. W. CLANCY, *Solicitor for Petitioner.*

Translation Title Papers in Case 78.

(Seal) Six Reals; second seal; six reals; years, seventeen hundred and eighty-eight and eighty-nine.

His excellency the Governer and Captain-General:

I, Jose Miguel de la Pena, a resident of the city of Santa Fe appear before your excellency in due legal form, and represent:

Sir, I have registered a piece of land situate in the place called Los Cerrillos, which said place or tract belonged, when this province was recently conquered, to Alonzo Rael de Aguilar, my wife Maria Rael's grandfather, and it having been abandoned for so many years, and said Don Alonzo having lost the right he had to it; now, sir, I ask Your Excellency for the same, in the name of His Majesty, with all its entrances, and exits, pastures and watering places, uses and customs, for me, my children, heirs, or the person or persons to me useful and of my will, to enable to plant and also to keep what

animals God may be pleased to give me, and I promise to settle said tract according to His Majesty's will and to what he commands in his royal ordinances. Wherefore, and in consideration of all else in my favor, I ask and pray Your Excellency, with the utmost submission, that you be pleased to hear me and grant to me in the name of His Majesty what I hope to obtain through your great righteousness, and your exact and sure distribution of justice, so that through this you may provide as to Your Excellency may seem proper. I implore Your Excellency's royal aid, and declare in due form that this my petition is not made in dissimulation, and as may be necessary, etc.

JOSE MIGUEL DE LA PENA.

Santa Fe, 20th April, 1788.

Finding expedient the cultivation of the land referred to in this petition, I visited the tract cited, and placed the petitioner and other heirs of Alonzo Rael de Aguilar in possession thereof, and
202 that it may be known in all time the proper documents will be duly made in his favor, by the chief alcalde of this city, Jose Antonio Ortiz.

CONCHA.

In this city of Santa Fe, on the 12th day of the month of June, of this year seventeen hundred and eighty-eight, I, captain of militia and chief alcalde of this city, in virtue of the preceding order and decree of His Excellency, Fernando de la Concha, lieutenant colonel and civil military governor of this province, proceeded to the place and location commonly called Los Serrillos, and notwithstanding that the petitioner had been placed in possession by said lieutenant colonel, I took by the hand the said Jose Miguel de la Pena and led him over the tract. He plucked up grass, cast stones and shouted saying, "Live our Lord, the King, whom may God preserve," taking quiet and peaceable possession of the said lands without any objection, I designating the boundaries, which are on the north, the boundaries of the Canada del Guycu and lands of the Bacas, on the south, the hills, on the east the road which leads to Galisteo, and said tract embraces by measurement from east to west 2,500 varas; and the said tract being divided in three parts, to the said Miguel de la Pena were assigned 833 varas, on the western side adjoining the lands of Cleto Miera, and on the east adjoining lands of the heirs of Antonio Teresa Rael de Aguilar, and on the other side the same boundaries as are stated in the preceding grant, I notifying him that the pastures and watering places are common. And that it may so appear in all time, I signed this as special justice, with my two attending witnesses, on account of the notorious lack of a public and royal notary, there being none of any kind in this province; to all of which I certify.

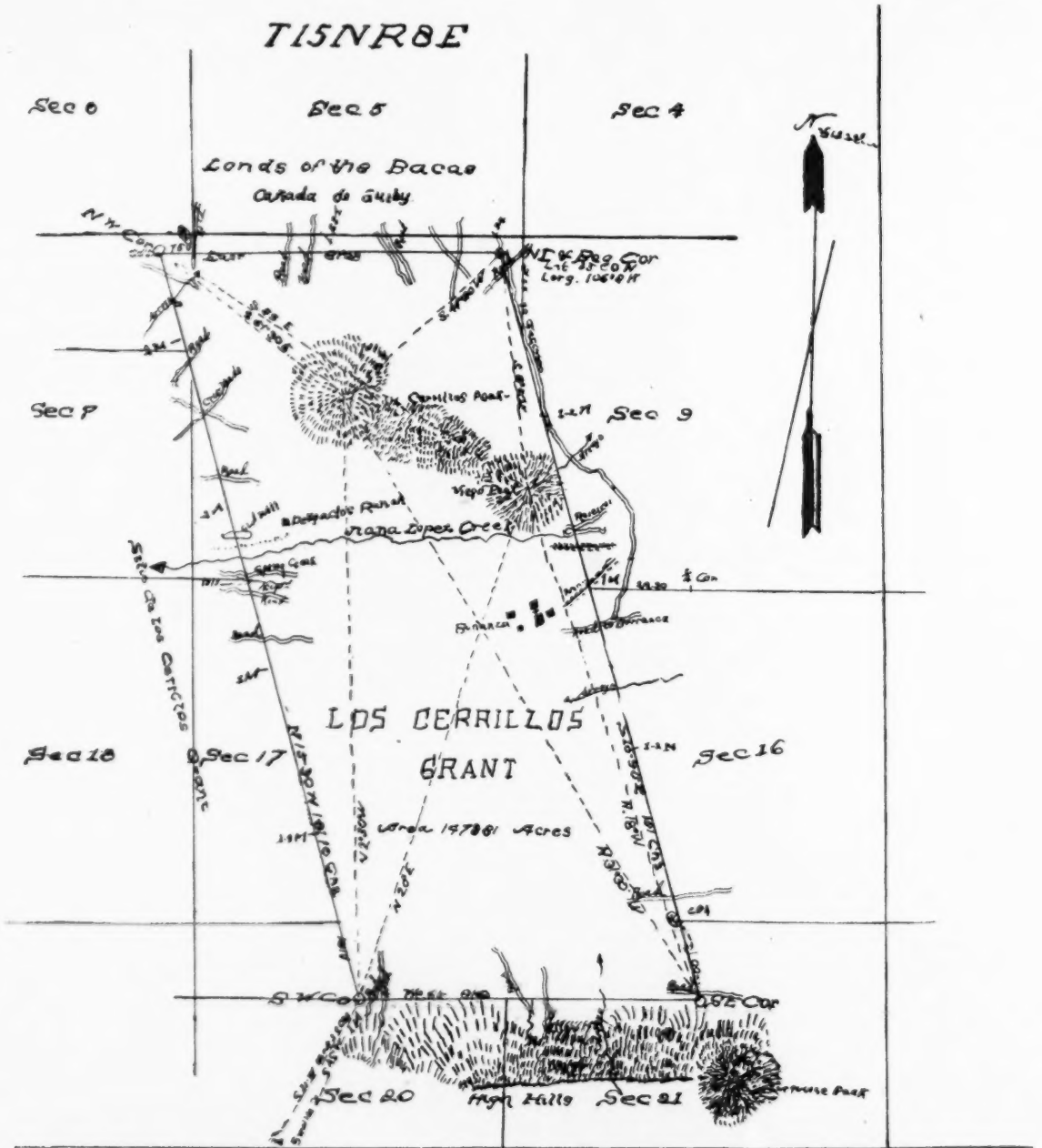
ANTONIO JOSE ORTIZ.

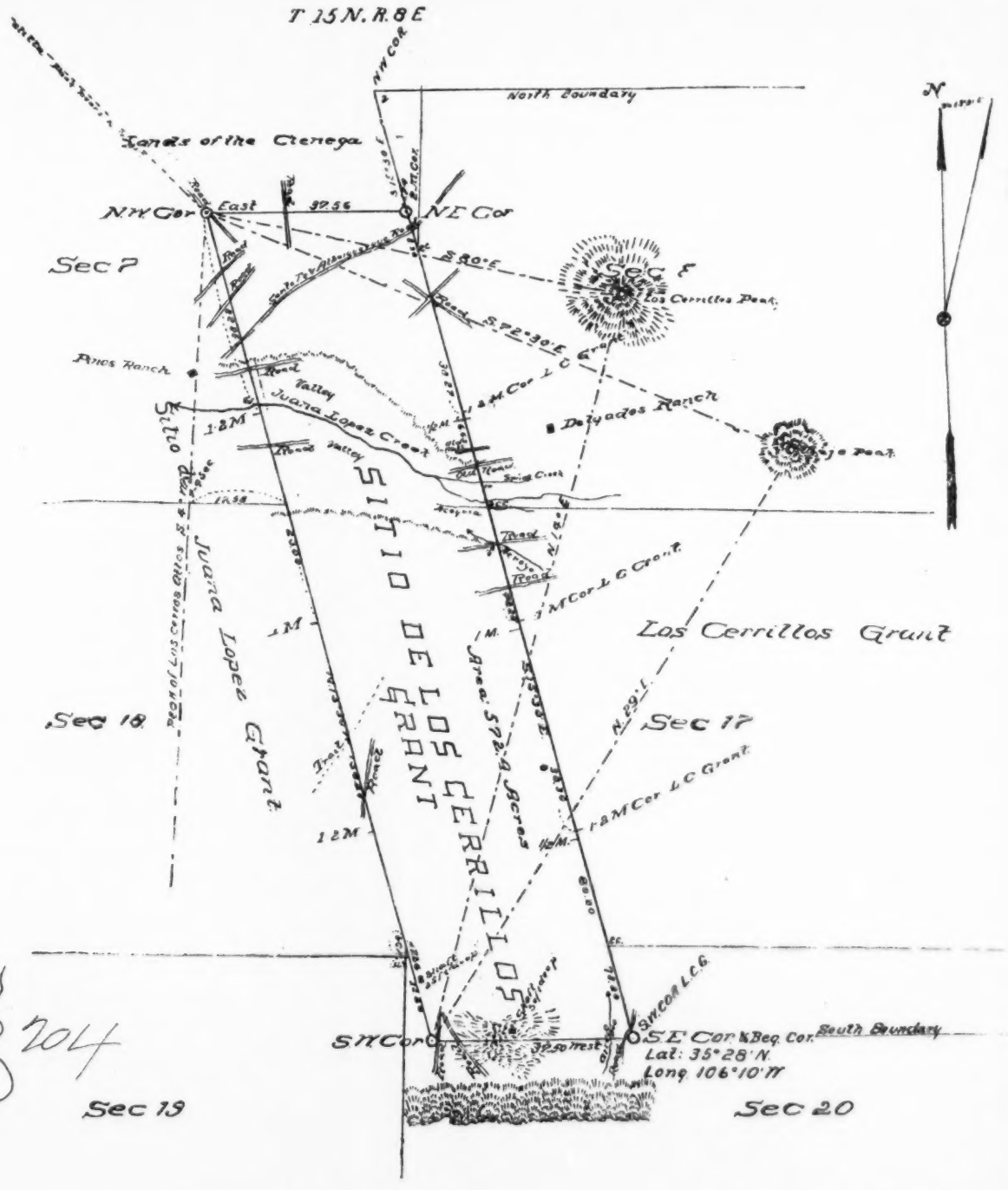
ANTO. JOSE ORTIZ.
JOSE MIGUEL ORTIZ.

In this city of Santa Fe on the 18th day of the month of February of the year seventeen hundred and ninety-one, before me Antonio Jose Ortiz, captain of militia and chief alcalde of this said city, appeared the above-mentioned Jose Miguel de la Pena, in whose favor the two documents that appear were executed, and declared that, with the consent of his children and of his wife, he would convey and did convey, to Cleto de Miera y Pacheco, the right, title and domicile which he had acquired to the tract called Los Ser-
205 rillos, as appears by the above documents executed in his favor, which he declared he conveyed with all the title necessary to the said Cleto Miera, the latter having paid him $450 in the currency of the country, which money the said Jose Miguel de la Pena declared he had received to his satisfaction and content, with which amount he acknowledged himself satisfied, content and paid; and if in the future it should become of greater value, he gives and donates the whole, pure, entire, perfect, and irrevocable, termed in law *inter vivos*, and that he may control and use the same at his pleasure; and he the said Pena, declared that he renounces all and every of the laws, requirements and circumstances which provide in his favor, and he requested me, that as chief alcalde. I interpose my sanction and judicial decree. and I, said chief alcalde, declared that I would, and I do interpose the same as fully as I am authorized by law; and that it may so appear, the said Pena signed with me to all of which I certify.

ANTONIO JOSE ORTIZ.
JOSE MIGUEL DE LA PENA.

(Here follow maps marked pp. 203 & 204.)


T15NR8E
Sec 6
Sec 5
Sec 4
Lands of the Bacas
Cañada de Guiby
N.W. Cor
N.E. Cor Sec 5 T15N
Long. 106°48' W
Sec 7
Sec 9
Cerrillos Peak
Vigas Peak
Arroyo Tapia
Arroyo Lopez Creek
Sierra de los Cerrillos
LOS CERRILLOS
GRANT
Sec 18
Sec 17
Sec 16
Area 19788.1 Acres
S.W. Cor
S.E. Cor
Sec 20
High Hills
Sec 21
Rep. No 59
P.L.C. No 78
No 40
Sena
v.
Estate
p. 285
No 73
Sena.
v.
Turquino Co.
p. 20.
285


T 15 N. R. 8 E
NW Cor
North Boundary
Lands of the Cienega
NW Cor
East
NE Cor
Sec 7
Los Cerrillos Peak
Pinos Ranch
Juana Lopez Creek
Delgados Ranch
Sitio de los Cerrillos Grant
Juana Lopez Grant
Los Cerrillos Grant
Sec 18
Sec 17
Area 572.4 Acres
SW Cor
SE Cor & Beg. Cor.
South Boundary
Lat: 35° 28' N.
Long 106° 10' W
Sec 19
Sec 20
No. 73.
Sena
vs
Duquoin
204

In the Court of Private Land Claims, Sitting at Santa Fe, New Mexico.

No. 78.

BEATRIZ PEREA DE ARMIJO
vs.
UNITED STATES.

Final Decree.

This cause having heretofore come to be heard upon the pleadings and exhibits on file, and upon the proofs taken, full legal proofs having been taken, and counsel having been heard for said parties, and the petition in this cause having been sustained by satisfactory proofs after due deliberation, the court being now sufficiently advised in the premises, makes the following findings of fact:

1. In the year 1788, Jose Miguel de la Pena presented a petition to Fernando de la Concha, then civil and military governor of the province of New Mexico, setting forth that he had registered a piece of land situate in the place called Los Cerrillos, which had belonged to Alonzo Rael de Aguilar, the grandfather of his wife, Maria Rael, and that it had been abandoned for many years, and that said Alonzo had lost the right which he had had, and that said Pena therefore asked of the governor that said land be given to him for himself, his children and heirs. On the 20th of April, 1788, the said gov-
207 ernor visited the said tract of land and placed the petitioner and other heirs of Alonzo Rael de Aguilar in possession thereof.

2. That said land has been in the continuous and undisputed possession of the heirs of said Alonzo Rael de Aguilar and their legal representatives from the time of the delivery of possession thereof by the said governor, as aforesaid, in the year 1788, down to the present time.

3. The petitioner is the legal successor in interest in part to the rights of the said heirs of the said Alonzo Rael de Aguilar. The court finds, as a matter of law, that the petitioner is entitled to a confirmation of the claim set up in her petition for the said land to the heirs and legal representative of the said Alonzo Rael de Aguilar.

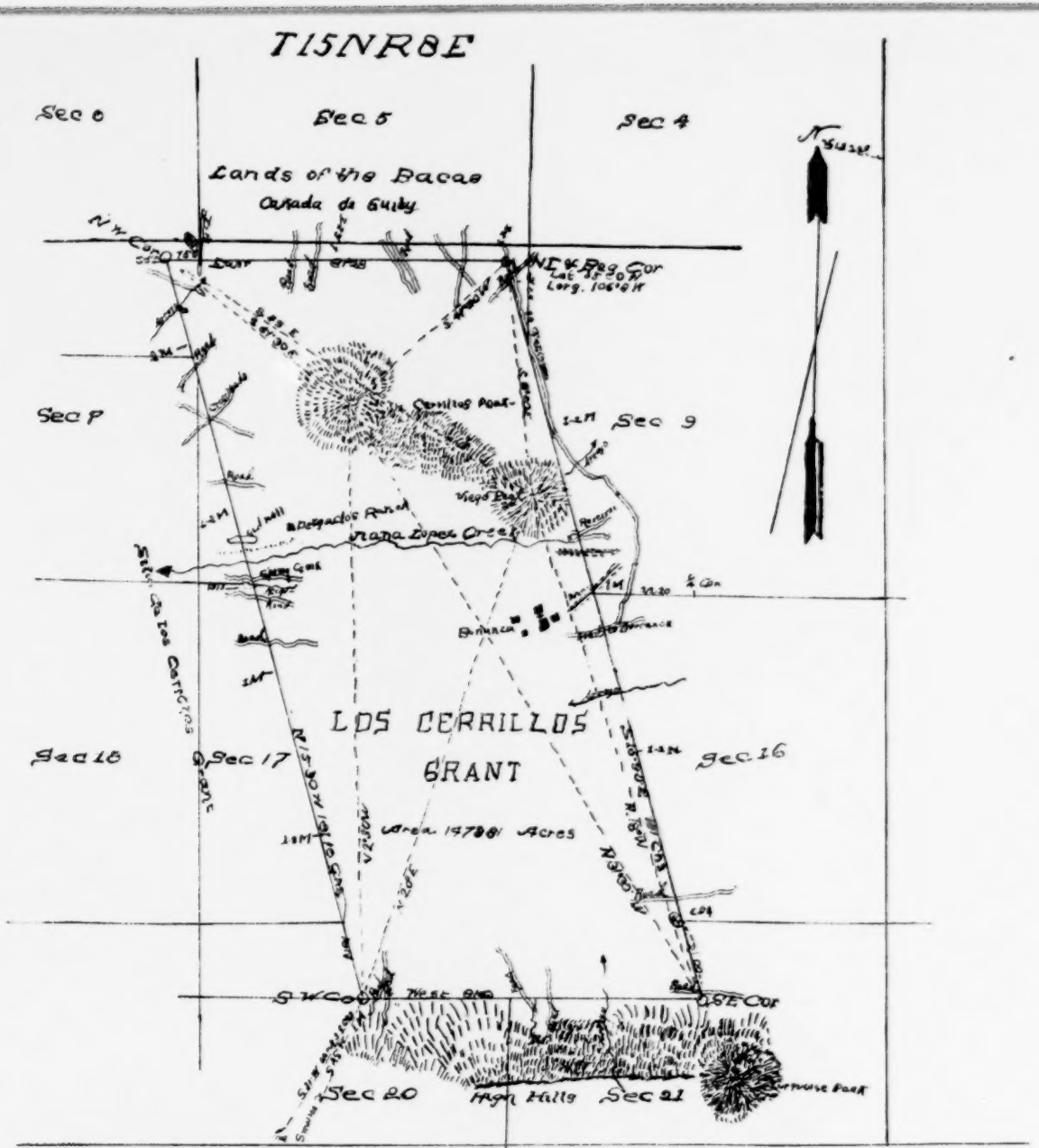
The court hereby specifies that the said land is located in the county of Santa Fe and Territory of New Mexico, and is commonly called the Cerrillos grant, and is bounded on the north by the boundaries of the Canada del Guicu and lands of the Bacas; on the south, by the high hills; on the east, by the road which goes to Galisteo, and on the west, by the lands of the grant to Cleto de Miera and Pedro Bautista Pino; that said land measures from east to west twenty-five hundred varas.

It is therefore ordered, adjudged and decreed by the court that the claim of the petitioner for the land hereinbefore described and

set forth be and the same is hereby confirmed to the heirs and legal representatives of Alonzo Rael de Aguilar; provided, however, as to any part thereof which may have been sold or granted by the United States to any other person, that such title from the United States to such other person shall remain valid, notwithstanding this decree, and leave is hereby given to said petitioner hereafter to present her claim to this court and make proof thereof as to the value of any such lands so sold or granted by the United States; and provided, further, that this confirmation shall not confer any right or title to any gold, silver or quicksilver mines or mineral of the same.

JOSEPH R. REED,
Chief Justice.

(Here follows map marked p. 206.)



Rep. No 59
P.L.C. No 78

No 73. Sena et al. p. 206.

285

No 40 Sena et al. p. 285

Mr. REYNOLDS: I offer in evidence the petition and the grant papers in the Cerrillos grant tract; and the approved plat,—unless I have already offered it before—and we can cover it in that
208 way, and also to show the claim of the Cerrillos tract before the surveyor general, before the preliminary survey, showing at that time it was larger than it is now.

These documents were not produced, but were to be marked Defendant's Exhibit No. 68.

Senor Governor and Lieut. Colonel Don Fernando Chacon.

Don Cleto Miera, Distinguished Sargeant of this Royal Post in campany with Don Pedro Pino. together and in conformity we appear before your Honor in all form and we say, that finding ourselves, the first without a piece of land to work in any place, because of my having been always in the service of the King my Master (whom may God preserve); the second being also without land to plant, for the reason that the place at which he now is is very small; wherefore we have resolved to petition your Honor for a piece of land which is known to belong to the Crown, to-wit, the Sitio de los Cerrillos, which we beg your Honor will deign to give us with peaceable possession, in the name of his majesty; its boundaries being: on the east the Ojo de los Cerrillos; on the west the boundaries of the Sitio de Juana Lopez; on the north the boundaries of the Sitio de la Cienega; on the south the wooded hills; which we beg that your Honor will deign to give us with possession, which we expect from your Honor's benignity, and in the granting of our petition we will receive favor.

Santa Fe, January 21, 1788.

(Undecipherable) to your Honor your most obedient subjects.

CLETO DE MIERA. [RUBRIC.]
PEDRO BAPTA. PINO. [RUBRIC.]

SANTA FE, *January* 24, 1788.

I consent to the grant of the lands which the petitioners ask for, whom I inform that they should not understand this to be in perpetuity, but only for the present, and until the time when circumstances may compel me, as well as my successors, to determine otherwise.

CONCHA. [RUBRIC.]

Date ut supra.

In order that the taking possession of this land be confirmed, the Alcalde Mayor of (this) city, Don Juan Ortiz, will proceed to give it, making careful investigation as to whether any Indian or resident, (of) those occupying contiguous lands, is prejudiced; and it being ascertained that there is no detriment to any third person, he will report in continuation of this decree in order to copy it in
209 the Government book of this Province, and afterwards on stamped paper (when that which is expected shall arrive), as a juridical document.

CONCHA. [RUBRIC.]

In this place of Los Cerrillos, on the 11th day of the month of February of the present year of 1788, I, said Alcalde Mayor, ad interim, in obedience of that which was ordered by Don Fernando de la Concha, Knight Comendador de Mora, of the Order of Santiago, Lieutenant Colonel (of) the Royal Armies of His Majesty, Governor (civil) and military of this Province of New Mexico and Inspector General, ad interim of his armies, having proceeded to the said place to give possession to the two who make petition, one of whom is the Sergeant Don Anacleto de Miera, and the other Don Pedro Pino, the heirs of Don Alfonzo Rael de Aguilar, being present, in the presence of all I made and measured a cord of fifty Castillian varas (in length), and with three eye-witnesses who were Don Joseph Miguel de la Pena, Bernardo de Sena Maese, and Juan Domingo Baldes, I went and measured the land which his Honor granted to the said two petitioners, having first drawn a boundary line which divides the lands which belong to the heirs of the said Don Alfonzo Rael, and on the west side between the lands of the said Rael and those of Don Pedro Pino, I measured nine hundred varas, of which I gave, in the name of his Majesty, whom may God preserve, to Don Cleto de Miera four hundred and fifty varas and to Don Pedro Pino as many more, which I gave to them in the same manner and terms in which his Honor grants them, having designated and made known their boundaries to them, which are: on the east and west lands of the Raels, and of the said Pino, and on the south the high hills, in a straight line, and on the north the boundary line of the Cienega; which possessions remain pendant and suspended until the stamped paper which is expected shall arrive. Thus I proceeded in this place of Juana Lopez on said day and month and year, to all of which I certify.

JU. ANTO ORTIZ. [RUBRIC.]

Santa Fe, April 1st, 1788.

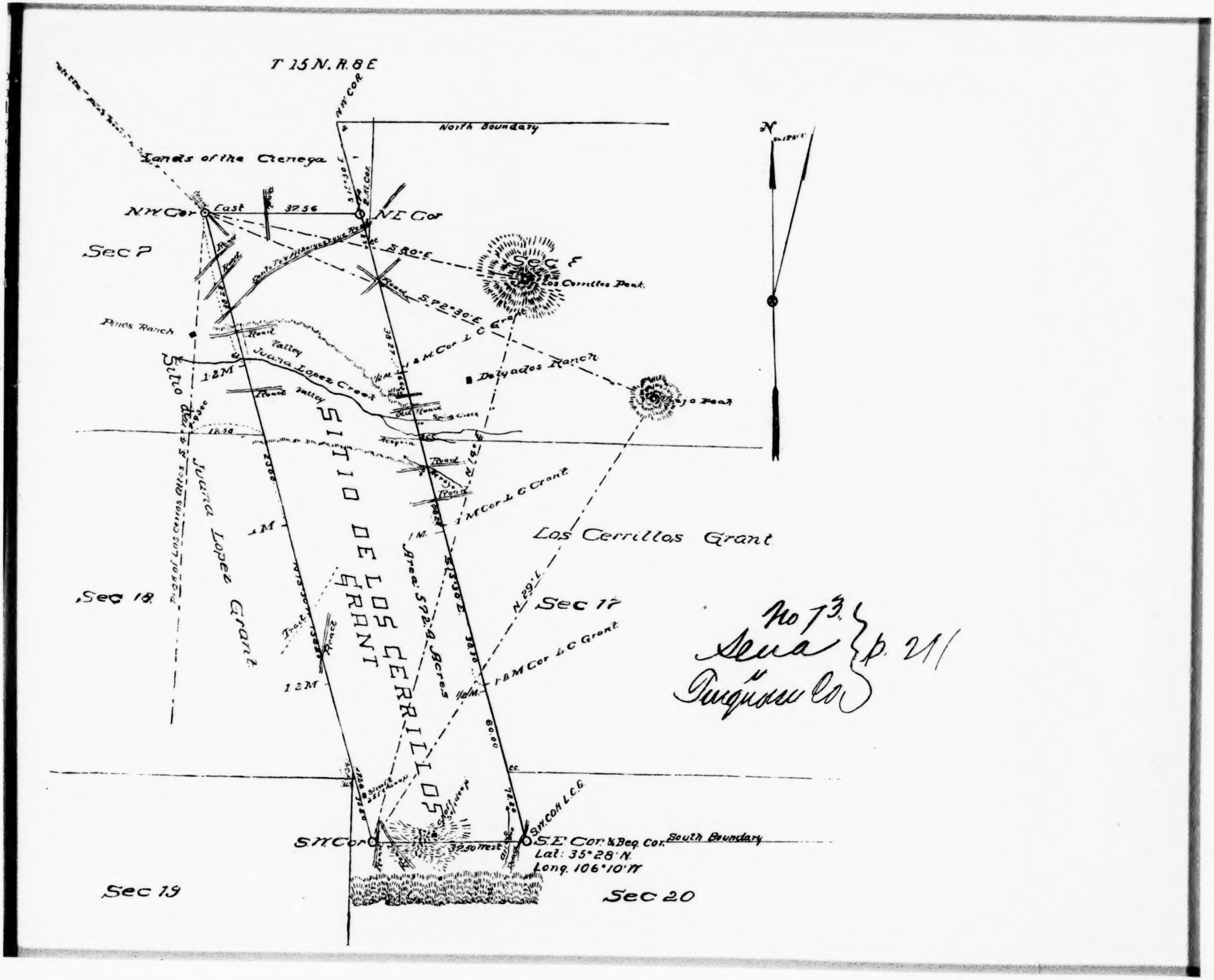
Let the document relating to this grant be perfected by the Alcalde Proprietario, Don Josef Ortiz.

CONCHA. [RUBRIC.]

(*Final Decree.*)

This cause having heretofore come on to be heard upon the pleadings and exhibits on file and upon the proofs taken, full legal
210 proof having been taken and counsel having been heard for said parties and the petition in this cause having been sustained by satisfactory proofs, after due deliberation, the court being now sufficiently advised in the premises, gives the following findings of fact:

1. That on the 21st day of January, 1788, Cleto de Miera and Pedro Baptista Pino presented their petition to Don Fernando Concha, then Governor of the Province of New Mexico, asking for the grant of a piece of land known as the Sitio de los Cerrillos, setting forth as the boundaries, on the east the Ojo de los Cerrilos, on the west the boundaries of the Sitio de Juana Lopez, on the north



T 15 N. R. 8 E
North Boundary
Lands of the Cienega
N.W. Cor
East
37.56
N.E. Cor
Sec 7
Sec 8
Los Cerrillos Peak
Pinos Ranch
Valley
Juana Lopez Creek
Delgados Ranch
Sitio
SITIO DE LOS CERRILLOS GRANT
Juana Lopez Grant
Los Cerrillos Grant
Sec 18
Sec 17
S.W. Cor
37.50 West
S.E. Cor. & Beg. Cor.
South Boundary
Lat: 35° 28' N.
Long. 106° 10' W.
Sec 19
Sec 20

the boundaries of the Sitio de la Cienega, and on the south the wooded hills; and that on the 24th of January, 1788, the said Governor made an order granting the lands asked for, but stating that this was not to be in perpetuity, but only for the present and until the time when circumstances might compel him or his successors to determine otherwise; and that the same day the said Governor made another order directing the Alcalde Mayor of Santa Fe to deliver possession and to report the same in continuation of the decree as a juridical document, and that on the 11th day of February, 1788, the said Alcalde Mayor in obedience to the said order of the said Governor delivered juridical possession of said land to the said grantees and made a report of his proceedings, in which report he declares the boundaries to be on the east the lands of the heirs of Alfonso Rael; on the west the lands of the grantee Pino; on the north the boundary line of the Cienega, and on the south the high hills, said land being nine hundred varas in width from east to west.

2. That the said grantees went into possession of said land on said 11th day of February, 1788, and by themselves, their heirs and legal representatives have retained and held continuous and undisputed possession of the same until the present time.

3. That the petitioner is the legal successor in interest in part to the rights of the said original grantees.

The Court finds as matter of law that the petitioner is entitled to a confirmation of the claim set up in her petition, to the heirs and legal representatives of the said Cleto de Miera and Pedro Baptista Pino.

The Court specifies that the said land is located in the county of Santa Fe and Territory of New Mexico, and is bounded as
212 hereinbefore set forth.

It is therefore ordered, adjudged and decreed by the Court that the claim of the petitioner for the land hereinbefore described and set forth be and the same hereby is confirmed to the heirs and legal representatives of the said Cleto de Miera and Pedro Baptista Pino, provided however, as to any part thereof which may have been sold or granted by the United States to any other person, that such title from the United States to such other person shall remain valid, notwithstanding this decree, and leave is hereby given to the said petitioner hereafter to present her claim to this court and make proof thereof as to the value of any such lands so sold or granted by the United States; and provided further, that this confirmation shall not confer any right or title to any gold, silver or quicksilver mines or minerals of the same.

JOSEPH R. REED,
Chief Justice.

(Here follows map marked p. 211.)

Mr. DAVIS: I desire to prove, if the court please, the fact, of which I suppose the books in the treasurer's office are the best evidence * * * but I do not desire him to bring in the books,—from the year 1895, that not one of the five mining claims, involved in this suit has ever been assessed for taxataion. The reason being obvious,—for they have been exempt from taxation by reason of the laws of the Territory.

The COURT: I believe only surface improvements are taxable in in this Territory.

Mr. DAVIS: The assessments on the surface improvements and the personal property have been paid, but the mining claims, as claimed here, evidently have never been assessed for taxation.

Mr. F. W. CLANCY: If you say they have never been assessed by name, I will admit that is so.

Mr. DAVIS: There is an assessment against The American Turquoise Company, in the following language on the tax roll: "Surface improvements, land and personal property." What I desire to prove is that the tax roll does not show any tax against any one of the mining claims.

Mr. F. W. CLANCY: If you say the mining claims have not been assessed and know that is so, let it go into the record.

Mr. DAVIS: The tax records show just as I have stated. The taxes on the improvements have been paid.

Mr. F. W. CLANCY: When was the first payment made?

213 Mr. DAVIS: In 1895 or in 1896.

Mr. REYNOLDS: Unless it is admitted, I desire to offer in evidence the patent of the United States to Thomas Whalen, for the northeast quarter of Section 34.

Mr. CLANCY: I don't think it is necessary—we agreed that Mr. Muller should send you memoranda of the entries within this claimed tract and their condition, and I think that should go in evidence as a part of his evidence.

Mr. REYNOLDS: The point I was after was to fix the time of the original patent—Homestead certificate No. 1820, application No. 2630. The date of the patent is the second day of September, 1892.

Mr. CLANCY: I object to the evidence as to any such patent, and the evidence which Mr. Fritz Muller is going to furnish us as to these entries—as not in any way tending to prove anything in issue in this cause, and as entirely irrelevant and immaterial.

Objection overruled by the court.

Exception reserved by Mr. Clancy.

Marked Defendant's Exhibit No. 69.

Mr. REYNOLDS: Now the last evidence we have unless the pleadings admit it, is the fact that no claim was asserted in the office of the Surveyor General with reference to this claim or map filed by anybody until the claim was filed in 1900 for confirmation of the grant by Mr. Sena.

Mr. CLANCY: I will admit there were no proceedings initiated so far as the records show in the Surveyor General's office—so far as this grant is concerned, but the original grant, which is a part of the evidence here has always been in the Surveyor General's office.

Mr. REYNOLDS: Archive No. 441 is on file in the Surveyor General's office, and I presume have always been there, but no claim was made through the act of 1854, and the regulations in the Surveyor General's office, or otherwise, for this claim, by any of the parties to claim this grant.

Mr. CLANCY: I will admit that no proceedings were initiated by any one, in the office of the Surveyor General with regard to this grant.

Mr. REYNOLDS: Under the act of 1854.

Mr. CLANCY: My position is it was not incumbent upon any one to do anything of the kind. The act of 1854 imposed no duty upon any one except the surveyor general. *I will ask that*
214 I will admit that there were no proceedings initiated in the surveyor general's office by anybody with reference to this grant.

Mr. REYNOLDS: That is all I want.

Mr. CLANCY: I think I should add in that connection that this archive, or grant papers, was in the list of papers reported by the surveyor general to the department of the interior and transmitted to congress in 1855.

Mr. REYNOLDS: I don't know whether it was transmitted in the year 1855, but Archive No. 441, was one of the list of archives that were reported under the regulations required to the department. That is true and I will admit it.

Mr. CLANCY: The index number and archive number here is 441.

Mr. CLANCY: I think you will also admit this—that in the report of the surveyor general, to the secretary of the interior, dated September 30, 1856, in schedule No. 2, which was an abstract of grants of land selected from the public records of the territory, found in the archives at Santa Fe, New Mexico, No. 87, out of a total of 197, reads, as follows:

"May 25th, 1728—Leyba, Jose de, Santa Fe County—Juan Domingo de Bustamente, Governor, which was printed in congressional documents of 1856, page 231, 245."

Mr. REYNOLDS: I have no disposition to deny it. It is a fact. It is a part of the report.

Defendants rest.

Plaintiff's Rebuttal.

FELIPE PINO, sworn.

Direct examination by H. S. CLANCY:

Q. Mr. Pino, you have stated heretofore, during the trial of this case that you were acquainted with Josefa Deyba, and Salvador Leyba, her nephew.

A. Not my nephew—my brother-in-law.

Q. Her nephew, I say—the nephew of Josefa Leyba.

A. Oh, yes, sir.

Q. Now state to the court and jury, how intimate your acquaintance was?

A. I was so intimate with him, that before he married my sister-in-law, his friendly relations with my father and myself were very intimate, and we were familiar. I knew him very well, in every respect.

215 Q. Now in regard to Josefa—you have been speaking of Salvador?

A. I was speaking of the two of them. When Salvador Leyba married my sister-in-law, our relations were very intimate at all times.

Q. State whether or not you were in the habit of visiting the house of Josefa frequently?

A. Very frequently.

Q. Now state whether or not you know of any acts by either Josefa or Salvador, acts of possession, in regard to the Jose de Leyba Grant?

Mr. DAVIS: If this is confined to acts he saw them do—that he saw them do things on the grant—there is no objection from us. If it is intended hereby to get in statements of Josefa or Salvador as to their possession of the Leyba Grant, we object to it as hearsay, and furthermore not rebuttal testimony.

Mr. CLANCY: I endeavored to avoid anything of that kind in the case in chief because it could only be proper in rebuttal.

Mr. DAVIS: I object on the further ground it calls for the conclusion of this witness as to acts of possession.

The COURT: I think I will let it in—as to what he himself saw them do—whether he saw them living there.

Mr. REYNOLDS: I desire to put in a further objection. It leaves to this witness the conclusion of acts of possession.

The COURT: I will allow him to answer, and if it is not responsive, I will take it from the jury.

WITNESS: I know by the acts which they did that they had possession of the land and of the Ojo del Coyote. I knew it from themselves. They had stock there—cows and oxen, burros and I don't know what else.

Mr. DAVIS: I move to strike that out.

Mr. CLANCY: Don't interrupt him—let us hear what he has to say—I think he will explain how he knows these things.

Mr. DAVIS: He has already stated that he knew it from them. The witness says—"He knew it from them"—It is purely hearsay and declarations in their own favor.

The COURT to WITNESS:

Q. Is that your entire answer?

Mr. CLANCY: I suggest that the court ask him, how he knew they had stock there.

The COURT:

Q. State how you know that the Leybas had stock there at the Ojo del Coyote?

A. Josefa Leyba told me that, and Salvador told me that

216 also, and at the times I was at the Ojo del Coyote, I understood from other people, that the place belonged to the

Leybas. The last time I was there to the place with my father—he sent me there for some oxen. Some gentlemen—I remember one, Juan Leyba, he was a peon of Don Manuel Delgado—I told him, "This is a beautiful place; it is a proper place for stock." I says, "Has Don Manuel Delgado his stock here?" and he says, "No, this land belongs to some Leybas." That is what I knew at that time.

Mr. DAVIS: Now I renew my motion to strike out, not only the answer of the witness, which was before objected to, but now to the statements he has just made, as to declarations made to him by the Leybas, and as to the conversation he had at the spring with a man named Juan Leyba, and other persons, on the ground it is hearsay.

The COURT: I will sustain the objection.

The COURT to Mr. CLANCY: I think if he saw cattle there himself of Salvador Leyba, it might be competent. I don't think what the men told him was admissible.

Mr. H. S. CLANCY:

Q. How do you know that these animals of the Leybas were pastured on the Leyba Grant, or at the Ojo del Coyote?

Mr. DAVIS: That is objected to as the witness has answered it in the other question. There is no testimony from this witness or anybody else, there ever were any cattle pastured on the Leyba grant. The question assumes a state of facts that don't exist.

The COURT:

Q. Did you ever see Salvador Leyba there at the Coyote Springs?
A. No, sir.
Q. Did you ever see his wife there?
A. No, sir.
Q. Did you ever know of their being there yourself?
A. Yes, sir.
Q. How do you know it? You say you never saw them there.
A. No, sir.
Q. All you know is what people told you then?
A. Yes, sir.

The COURT: I will sustain the objection.
Exception reserved by plaintiff's counsel.

Mr. H. S. CLANCY:

Q. Mr. Pino, I will ask you if you know of your own
217 personal knowledge of any cattle belonging to either Salvador Leyba or Josefa Leyba being pastured on either the Leyba Grant, or at the Ojo del Coyote. Cattle that you personally knew belonged to those people?

A. Yes, I know.

Q. State whether or not you know as to the use made by either Josefa Leyba or Salvador Leyba of these cattle, of your own personal knowledge?

A. I knew that they had given them on shares to a lady named Manuela Tenorio. I don't know whether they were 30 or 40 head

of stock, and of the increase, when they received them. I don't know what they did with them.

Q. Do you know of your personal knowledge, whether those cattle that were on shares, were ever turned over to the owner?

A. Yes, sir; I know that they were delivered to them.

Q. When were they delivered?

A. They delivered them to them here in Santa Fe. I know also they used to bring stock to kill. Not always, but sometimes. I saw that, because I lived close by. Our houses were right close to each other.

Q. Can you state any other acts either by Josefa Leyba or Salvador Leyba, in regard to this tract of land, of your own personal knowledge?

A. They used to tell me that property belong to them.

Mr. DAVIS: I move to strike that out.

The COURT: Oh, I don't think it makes any difference. It is hearsay. You can except to it.

Mr. DAVIS: I will be compelled to take an exception to it. You can prove pedigree by hearsay, but not ownership of property.

Q. When did you first become acquainted with the tract of land in question?

A. About 1858 or 1859, I think.

The COURT:

Q. What part of it did you know at that time—was it the spring?

A. I knew the spring and the country around there. I did not go around it very much.

Mr. H. S. CLANCY:

Q. As I understand you, you visited the Ojo del Coyote before 1858?

A. I think I was there one time. I think I was there three or four times during the time I visited there.

218 Q. At the first time that you visited the Ojo del Coyote, where was the nearest house where people were living?

Mr. CLANCY: What I desire to show if the nature of the country was such that at that time at least there was no one living in permanent habitations within the limits of this grant, and that the nearest place where anybody was living was at the place called Los Cerrillos, at the Delgado Ranch.

Mr. REYNOLDS: That is all right. I will admit that, too.

ANDRES C. DE BACA recalled.

Direct-examination by Mr. H. S. CLANCY:

Q. Are you acquainted with a man named Michael O'Neil?

A. Yes, sir, I am.

Q. How long have you been acquainted with him?

A. For about sixteen or eighteen years.

Q. Mr. O'Neil has testified in this case that a number of years ago you had informed him that the arroyo at the canyon below the Coyote Springs was called the Coyote Canyon. State whether you ever gave Mr. O'Neil such information.

A. I could not tell him that, because I have never known the place by that name.

Q. Did you ever hear of any canyon in that section of the country known as Coyote Canyon?

Mr. REYNOLDS: This witness testified to the names of the canyons and the conditions down there before. It seems to me this was gone into by Mr. Baca and was one of the things gone into in chief.

Mr. CLANCY: We say there never was any such canyon in existence, and it was first introduced into the case by evidence for the defendant.

The COURT: Well, proceed.

Exception reserved by defendant's counsel.

Mr. CLANCY: We desire to show not merely the contradiction of the witness O'Neil, but contradiction of the fact that there is any such canyon in that section, known by that name.

A. No, sir.

Q. Are you acquainted with Diego Mares?

A. Yes, sir, I am.

Q. For how long have you been acquainted with him?

A. I have known him since 1869.

Q. Do you know where Mr. Diego Mares lives at the present time?

219 A. I think he lives in the town of Waldo, or Cerrillos now.

Q. Is it or is it not a fact that Mares lives at La Cienega in Precinct No. 6?

The COURT: He says he lives at Waldo or Cerrillos.

Mr. CLANCY: I desire to find out if he ever lived at that place and when he ceased to live there.

Mr. CLANCY:

Q. Do you know whether Diego Mares ever lived at La Cienega, in Precinct No. 6 of this county?

A. Yes, when I first knew him he lived there.

Q. Do you know when he ceased to live there?

A. I think he went out of the precinct in about 1882 or 1883.

Q. And do you know of your own personal knowledge that he is not a resident of that precinct now?

Objected to as leading.

Objection sustained. Exception reserved.

Q. Is Mares a man of family?

A. Yes, sir, he is.

Q. Do you know of his ever having any other place of residence outside the La Cienega and Waldo, as you have testified?

A. Yes, I knew him to live once at a place near San Marcos. He

took a homestead at the Canada de las Gallinas, at the San Marcos hill and at one time for some time he was living at Carbonateville too.

Mr. REYNOLDS to Witness: Did you hear Mr. O'Neil testify yesterday or this morning?

A. No, sir, I did not.

Testimony closed.

The foregoing was all the testimony introduced in the case.

TERRITORY OF NEW MEXICO,
County of San Miguel:

I, W. E. Gortner, official stenographer by appointment, certify that the foregoing contains a true, perfect and correct transcript of the testimony introduced on the part of the plaintiff and defendant, in said cause, as the same was taken down and transcribed by me.

Witness my hand this 10th day of May, 1906.

W. E. GORTNER, *Stenographer.*

Mr. F. W. CLANCY to Court:

I desire, on the part of the plaintiff, first to address myself to the court, and to ask the court to direct the jury to find a ver-
220 dict in favor of the plaintiff upon the whole evidence. In support of that I want to say that the record discloses here—aside from the plea of general issue—which merely puts upon the plaintiff the burden of establishing his case — to go to the jury. The defense raised here first is that of the statute of limitations, and secondly, as near as I can understand the pleadings, there is an attempt to set up an equitable estoppel against the plaintiff. So there would be two subjects for consideration. Our position is that there has been an entire failure to establish anything whatever under the defense of the statute of limitations or adverse possession, and I shall be compelled to take a little time to call your Honor's attention to the results of a somewhat careful investigation which we have made as to the law applicable to such evidence in support of a plea of the statute of limitations to title by adverse possession, as appears in this case * * *

Mr. DAVIS to Court:

The propositions relied upon by the defendant in this case, in support of the motion to instruct the jury in its favor, are four:

1. The proposition that it has not been shown, that the grant of plaintiff is a perfect grant.

2. The proposition that even though the grant of the plaintiff may have been perfect, that he has lost his rights by reason of laches.

3. The third argument in this case—the defendant claims that the deed introduced in evidence from Salvador Leyba to himself, the only claim which he has shown for his own title, is an absolute nullity and is void, for the reason that it was made when the grantor

was not in the possession of the premises, but had been ousted by the defendant in this case.

4. The fourth proposition is, that even granting all that plaintiff has claimed in this case as to the character of his grant, that none the less he is barred by the strict rule of the statute of limitations.

Argument here followed, by Mr. Clancy, for plaintiff, and Messrs. Reynolds and Davis on behalf of defendant, and at the conclusion of which the court made the following ruling:

MARIANO F. SENA, Plaintiff,
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221 The court instructs the jury that under the pleadings and evidence introduced the plaintiff is not entitled to recover in this action, and the verdict will be for the defendant, and instructs the jury to return a verdict of not guilty as to the defendant, The American Turquoise Company.

Sante Fe, September 1, 1905.

In ruling on the motion of plaintiff and defendant to instruct the jury, the court said:

The COURT: Gentlemen, in the case of Mariano Sena vs. American Turquoise Company, an ejectment suit, the evidence has all been heard and each side has made a motion, asking the court to direct the jury to return a verdict. Before proceeding further, the court will appoint R. J. Palen, Esq., foreman of the jury.

In this class of cases, gentlemen, we recognize that the plaintiff has to recover on the strength of his own title and not on the weakness of that of the defendant. That is so in all cases of ejectment. The first point raised in this case—and if that is decided in favor of the defendant, it practically settles the case—and the other three points the defendant relies upon, that of estoppel and the statutes of limitation—it will not be necessary to pass upon them.

The first ground of the motion of defendants for an instruction of the court for the jury to return a verdict, is that this is not a perfect grant; that it is what they allege and what they claim. It is in evidence here that this case was before the land court—not this case, but the Jose de Leyba grant was before the land court, and it was put in before the land court after the time for filing imperfect grants had expired. The land court, as I understand it, held that this grant was not a perfect grant, and therefore could not come in at that time, because the period of two years allowed for filing these imperfect grants had expired, and they rendered a decision against the confirmation of this grant. That case was taken to the Supreme Court of the United States, but the Supreme Court did not pass on the question whether or not this grant was a perfect grant, but on reading that case, I am of the opinion that they very strongly intimated, that in the opinion of the court, it was not. Now, as I understand it—a perfect grant, is a grant where the title papers

are perfect. In this case the original grant seems to have been a paper grant made by Governor Bustamente, and the possession probably is as good as in most of the grants—but there is a
222 serious question as to whether this is any grant at all, on account of it never having been approved by the King of Spain, which the laws of Spain at that time required in order to make it a grant—but perhaps, as these parties were in possession at the time, and the fact that the Supreme Court says, in 1838, I think is the date of that last will,—it might be held that these people claimed it, and there being no proof they were dispossessed, there was a tacit confirmation of the grant. Whether that is so or not, perhaps it is not necessary to pass upon here. Now another thing to constitute a perfect grant: I think the description of the boundaries must be such that any person after taking evidence as to the boundaries must be able to locate it on the earth surface. The Supreme Court say that the western boundary (and a part of the western boundary you claim to have proved)—the Supreme Court say that the western boundary and the southern boundary is exceedingly imperfect, and it is almost impossible for anybody to locate it.

From the evidence introduced here, it seems to me it cannot be doubted that it is a fact, that these two—the western and southern boundaries are very imperfect. You claim that it is bounded by a straight line from the land of Juan Garcia de las Rivas. That only covers a small part of the western boundary as claimed. The Cerrillos Grant comes over it. Which would be the better grant I don't know. It is certainly a grant, which certainly could not be decided without evidence and without a hearing. The line on the south is also I think very doubtful—as to where that line is—that is the arroyo Cuesta del Oregano,—several witnesses testified that there was such a Cuesta of the Canada, and it was at such a place while others testified there is no such place at all. Four or five witnesses—I don't recall how many—testified there is no such a place as the Canada Oregano, and that they never heard of it. I don't think it could be ascertained without taking a great deal of testimony.

I am of the opinion that this is not a perfect grant within the contemplation of the law, and not being a perfect grant that the plaintiff, Mariano F. Sena, has no title to it. I therefore will have to overrule the motion made by the plaintiff, asking for an instruction of the court to the jury to find for the plaintiff. Having held as I do in regard to this grant, it is not necessary to speak of the other points which were raised.

I think, however, in this class of cases—I think these
223 people have got a right in going on the land, and they had held it adversely. I think the United States cannot take it away from them. I don't think the United States could repeal the mining laws and take away the land of these people so long as they complied with the law under which they took it, and I am inclined to think the statutes of limitations would be good, and if the statute of limitations would be good, that defense would also be good.

As to the question of estoppel, I don't think there has been anything shown here which would act as an equitable estoppel. There is some doubt whether equitable estoppel can be pleaded in this class of law cases.

Holding as I do, that this grant was not a perfect grant, I will have to sustain the motion of the defendant to instruct the jury to return a verdict for the defendant. If I did not—if the jury found for the plaintiff in this case—as I think, as a matter of law, it is not a perfect grant—if the jury should find in favor of the plaintiff, the court would have to set aside the verdict. Therefore, I will instruct the jury to return a verdict for the defendant, The American Turquoise Company, and to this you gentlemen may except and pray an appeal and it is granted.

Mr. F. W. CLANCY: Before asking for an appeal, we desire to submit a motion for a new trial.

Mr. DAVIS: Mr. Clancy and I can prepare a verdict to place on the record.

Exception reserved by plaintiff's counsel to the action of the court in directing a verdict, and in overruling the motion of plaintiff to direct the jury to return verdict for the plaintiff.

And afterwards, on the 4th day of September, 1905, plaintiff filed his motion for a new trial of said cause, which said motion is as follows, to-wit:

Now comes the plaintiff by his attorneys and moves the court to set aside the verdict heretofore rendered herein, and to order a new trial of this cause for the following reasons:

1. The court erred in admitting improper evidence on behalf of defendant.

2. The court erred in excluding proper evidence offered on behalf of plaintiff.

3. The court erred in directing a verdict for defendant.

224 4. The court erred in holding that the title of plaintiff was imperfect.

5. The court erred in holding that there was any uncertainty as to the southern boundary of the grant to which plaintiff has title

6. The court erred in holding that there was any uncertainty as to the western boundary of the grant to which plaintiff has title.

7. The verdict is contrary to the evidence.

8. The verdict is contrary to the law.

9. The verdict is contrary to the weight of the evidence.

10. The court erred in refusing to instruct the jury to find in favor of the plaintiff.

11. There is no evidence to support the verdict.

12. The court erred in holding that plaintiff could not recover unless he had a perfect title to the land in controversy.

13. The land in controversy, included in the alleged mining claims of defendant, was, by the uncontradicted evidence, shown to be within the boundaries of the grant to Jose de Leyba.

F. W. CLANCY
H. S. CLANCY,
Attorneys for Plaintiff.

Which said motion was by the court denied, to which ruling the plaintiff then and there excepted.

And afterwards, on the 4th day of September, 1905, plaintiff filed his motion to arrest the judgment in said cause, which said motion is as follows, to-wit:

Now comes the plaintiff by his attorneys and moves the court to arrest the judgment on the verdict heretofore rendered herein, for the following reasons:

1. The court erred in sustaining the demurrer to the replication numbered 2, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

2. The court erred in sustaining the demurrer to the replication numbered 3, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

3. The court erred in sustaining the demurrer to the repli-
225 cation number 4, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

4. The court erred in sustaining the demurrer to the replication numbered 5, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

5. The court erred in sustaining the demurrer to the replication numbered 6, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up said replication.

6. The court erred in sustaining the demurrer to the replication numbered 7, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

7. The court erred in sustaining the demurrer to the replication numbered 8, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

8. The issue tendered by the replication numbered 10, to part of the third amended plea, was an immaterial issue.

9. The court erred in overruling plaintiff's demurrer to portions of the third amended plea, thus forcing plaintiff to reply to those portions.

10. The issue tendered by the replication to the portions of the third amended plea, previously demurred to, was an immaterial issue.

F. W. CLANCY AND
H. S. CLANCY,
Attorneys for Plaintiff.

Which said motion was by the court denied, to which ruling the plaintiff then and there excepted.

And because the foregoing matters may not otherwise be of record in said cause, the plaintiff asks that this, his bill of exceptions, containing the same, be signed, sealed and made a part of the record, which is accordingly done this 28th day of August, 1906, and it is hereby certified that this bill of exceptions contains all of the evidence offered or received on the trial of said cause, with the excep-

tion of defendant's Exhibits 61 and 62 which appear to be lacking,
as to which, however, it is further certified that said exhibits
226 were not actually produced in court and shown to the
jury, counsel for defendant stating, at the time, that they were in the land office in Washington and that copies would later be supplied to complete the record, but such copies never have been furnished, and are not material to this record.

WILLIAM J. MILLS,
Chief Justice of Supreme Court of New Mexico, and Judge of the District Court of San Miguel County.

TERRITORY OF NEW MEXICO,
County of San Miguel, ss:

I, the undersigned, clerk of the district court of said county, hereby certify that the foregoing is a full, true and perfect copy of so much of the record in a certain cause lately pending in said district court wherein Mariano F. Sena was plaintiff and the American Turquoise Company was defendant, as I was directed by plaintiff's counsel to include herein as a record for the review of said case in the Supreme Court of said Territory.

In witness whereof, I hereunto set my hand and the seal of said district court this tenth day of October, A. D. 1906.

[SEAL.] SECUNDINO ROMERO, *Clerk.*

227 And Afterwards, on towit: on the first day of December, A. D., 1906, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors in the above entitled cause, which said assignment of error was and is in words and figures, following to wit:

In the Supreme Court of the Territory of New Mexico.

No. 1167.

MARIANO F. SENA, Plaintiff in Error,
vs.
AMERICAN TURQUOISE COMPANY, Defendant in Error.

Error to District Court, Santa Fe County.

Assignment of Errors.

Now comes the plaintiff in error, and says that there is manifest error in the record and proceedings in this cause in the court below, and assigns the following as such errors:

1. That the Court erred in sustaining the demurrer to the replication numbered 2, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

2. The court errred in sustaining the demurrer to the replication numbered 3, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

3. The Court erred in sustaining the demurrer to the replication numbered 4, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

4. The Court erred in sustaining the demurrer to the repli-
228 cation numbered 5, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

5. The court erred in sustaining the demurrer to the replication numbered 6, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

6. The court erred in sustaining the demurrer to the replication numbered 7, to the second amended plea, thus forcing the plaintiff to go to trial without the benefit of what is set up in said replication.

7. The court erred in sustaining the demurrer to the replication numbered 8, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

8. The Court erred in compelling plaintiff to go to trial on the issue tendered by replication numbered 10 to part of the third amended plea, which was an immaterial issue.

9. The court erred in compelling plaintiff to go to trial upon the issue tendered by the replication to portions of the third amended plea, previously demurred to, which was an immaterial issue.

10. The court erred in directing a verdict for the defendant.

11. The Court erred in refusing to direct a verdict in favor of the plaintiff.

12. The court erred in holding that the title of plaintiff was imperfect.

13. The Court erred in holding that there was any uncertainty as to the southern boundary of the grant to which plaintiff has title.

14. The court erred in holding that there was any uncertainty as to the western boundary of the grant to which the plaintiff has title.

229 15. The Court erred in holding that the plaintiff could not recover unless he had a perfect title to the land in controversy.

16. The court erred in excluding from evidence plaintiff's exhibit "M" (p. 89-90 of record).

17. The court erred in admitting in evidence location notices of five mining claims, which are defendant's Exhibits 1 to 5 inclusive. (p. 100-1 of Record).

18. The Court erred in admitting in evidence, deeds of conveyance of said mining claims, which are Defendant's Exhibits 6 to 17, both inclusive (pp. 101-6 of Record).

19. The Court erred in admitting in evidence notices to hold and

work four mining claims, which are Defendant's Exhibits 18 to 21, both inclusive, (pp. 107-7 of Record).

20. The Court erred in admitting in evidence proof of labor on five mining claims for years 1896 to 1903, both inclusive, which are defendant's Exhibits 22 to 57, both inclusive, (pp. 107 to 114, of Record).

21. The court erred in admitting in evidence the depositions of Nazario Gonzales and Jesus Narvais, which is defendant's Exhibit 66 (p. 174 of Record).

22. The court erred in admitting any evidence as to patents or entries under the public land laws (p. 199 of Record).

23. The court erred in denying plaintiff's motion for new trial.

24. The court erred in denying plaintiff's motion in arrest of Judgment.

Wherefore plaintiff in error prays judgment of this record, and that the judgment therein contained be reversed, set aside, and altogether held for naught, and that judgment be entered in this court in favor of said plaintiff, or that this case be remanded to the court below with directions to vacate the said judgment and set aside the verdict upon which the judgment was based, and to order a new trial of the issue between the parties.

F. W. CLANCY,
H. S. CLANCY,
Attorneys for Plaintiff in Error.

230 which said assignment of error was and is endorsed on the back thereof as follows, towit: "No. 1167, Supreme Court of New Mexico. Mariano F. Sena vs. American Turquoise Company. Assignment of errors. Filed in my office this Dec. 1st, 1906. Jose D. Sena, Clerk.

And afterwards, on to wit, At a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday in January, A. D., 1907, on the tenth day of the said regular term, the same being Monday the twenty-fifth day of February, the following among other proceedings were had and entered of record to-wit:

No. 1167.

MARIANO F. SENA, Plaintiff in Error,
vs.
AMERICAN TURQUOISE COMPANY, Defendant in Error.

Error to District Court, Santa Fe County.

It is ordered by the court that Honorable Matt G. Reynolds, be and he hereby is admitted to practice before this Court, for the purposes of this cause.

And afterwards, on to wit, on the tenth day of the said Regular Term, the same being Monday the 25th day of February, A. D., 1907, the following among other proceedings were had and entered of record, following towit:

No. 1167.

MARIANO F. SENA, Plaintiff in Error,
vs.
AMERICAN TURQUOISE COMPANY, Defendant in Error.

Error to District Court, Santa Fe County.

This cause coming on for hearing upon the transcript of record, as-ignment of errors and briefs of counsel, is argued by
231 F. W. Clancy, Esq. for Plaintiff in error, and Matt G. Reynolds, Esq. and Stephen B. Davis, Jr., Esq., for defendant in error, and submitted to the court, and the court not being sufficiently advised of the premises takes the same under advisement.

And afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government, on the first Wednesday after the first Monday in January, A. D., 1908, on the fourteenth day of the said regular term, the same being Wednesday, the second day of September, A. D., 1908, the following among other proceedings were had and entered of record, following to wit:

No. 1167.

MARIANO F. SENA, Plaintiff in Error,
vs.
AMERICAN TURQUOISE COMPANY, Defendant in Error.

Error to District Court, Santa Fe County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice Frank W. Parker, Associate Justices, Abbott, Mann and McFie, concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file. It is therefore considered and adjudged by the court that the judgment of the District Court in and for the County of Santa Fe, whence this cause came into this Court, be and the same hereby is affirmed, and that in accordance therewith, It is considered and adjudged by the court that the said defendant in error go hence without day and recover of the plaintiff in error Mariano F. Sena, its costs in this behalf expended for which let execution issue.

232 And afterwards, on to wit: on the second day of September A. D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion by the court in the above entitled cause, which said opinion by the court was and is in words and figures following towit:

233 In the Supreme Court of the Territory of New Mexico.

January Term, A. D., 1908.

No. 1167.

MARIANO F. SENA, Plaintiff in Error,
vs.
THE AMERICAN TURQUOISE COMPANY, Defendant in Error.

Error to District Court, Santa Fe County.

Opinion of the Court.

PARKER, *J.*

This is an action in ejectment brought by plaintiff to recover possession of certain lands in Santa Fe County. Plaintiff claims these lands to be within a Spanish Grant made in 1728 by the Governor and Captain General of the province of New Mexico to Jose de Leyba, from whom he deraigns title. Defendant is in possession by virtue of certain mining locations, the first being made as far back as 1885, attacks the validity of the Jose de Leyba Grant, relies on the statute of limitations, the alleged laches of plaintiff, and also asserts the invalidity of plaintiff's deed from the heirs of Jose de Leyba on the ground that at the time of its execution the land in controversy was in defendant's adverse possession. While the pleadings are somewhat extensive, the foregoing is a fair statement of the issues as made both by the pleadings and the proofs during the course of the trial. There is a little conflict as to the facts, and the decision of this Court must turn entirely on the law points involved. Some of these points were discussed when the grant now relied on by plaintiff was before the court of Private Land Claims, and the Supreme Court of the United States (Sena vs. U. S., 189 U. 233) and although the decision of those courts is not res-adjudicata in this case, still their reasoning is persuasive and their conclusions valuable aids towards the correct determination of the same questions by this Court.

The first and only question we deem it necessary to examine, is as to the character of the Jose de Leyba Grant. Its present
234 value, as the basis of title, depends entirely on its original character and the recognition to which it was entitled under the laws of Spain and Mexico, for it has not been confirmed either by Act of Congress or by the Court of Private Land Claims, and has therefore received no strength from any action of the political department of our government.

In Ely's Administrator vs. U. S., 171, U. S. 220, Mr. Justice

Brewer remarks that few cases are more perplexing than those involving Mexican Grants. This is true, whether the Grant originated under Mexican or Spanish Rule. Yet in this case we are forced to a discussion of the Spanish law as applicable to the Jose de Leyba Grant, for if it was not a complete and perfect grant under Spanish law it is not available to plaintiff as the foundation on which to base this action of ejectment. If it is an imperfect grant, its recognition is forbidden by Section 12 of the Act of Congress of March 3, 1891, providing that such grants after two years should be considered by all courts as abandoned and should be forever barred. By this statute, this court is, of course, bound.

Perhaps the distinction between perfect and imperfect grants is best defined in the case of Hancock vs. McKinney, 7, Tex. 384; at least that case has been often cited on the point, and is quoted from in the brief for plaintiff in error. In that case the Supreme Court of Texas in discussing this point with reference to grants made by Coahuila and Texas, and the rule would be the same by whatever sovereignt*h* the particular grant was made, says:

"The distinction between perfect and imperfect titles, under the government of Coahuila and Texas, has been often discussed in this Court, and resulted in the acknowledgement of the distinction, and resting it on the following basis, that is to say: If the grant were to receive no further act to constitute it an absolute title to the land from the legal authorities, taking effect *in presenti*, it was a perfect title, requiring no further action of the political authority to its perfection. But if something remained to be done by the govern-
235 ment or its officers, such title or right was imperfect; and until it received the sanction of the political authority it could not claim juridical cognizance."

The distinction between perfect and imperfect grants has also been discussed by this court in the Ojo de Borrego and the Antonio Baca grant cases 12 N. M. 62 and 169.

Applying this rule to the case at bar we must enquire whether or not anything remained to be done by the Government of Spain or by its officers in connection with the Jose de Leyba Grant. If so, then that grant does not measure up to the standard and must be declared imperfect.

The Jose de Leyba Grant having been made in 1728, is subject to the provisions of the Roy*b*al Regulation of the King of Spain dated at San Lorenzo el Real, October 15, 1752 (2 White's Recp. 62). It appears that this regulation was made necessary by a royal decree dated November 24, 1735, the terms of which required that all grants of land within the Spanish dominion should be approved by the King himself before being finally valid. When we consider the extent of Spanish rule and the difficulty of communication between Madrid and the distant provinces, the inconveniencies necessarily caused by this order is obvious. While the Spanish Government was not willing to trust the complete disposition of the royal lands to subordinate officers, still it realized the necessity of taking steps to make more simple the acquisition of titles, and for that purpose the King by the Regulations of 1754 did away with the ne-

cessity of his personal confirmation. By the first section of the Regulation the Viceroys and Presidents of the Royal Audiencias were ordered to appoint sub-delegates who should be entrusted with this duty, and, to render it still easier to comply with the King's will, by section 12 the confirmatory power was conferred on the Governors of distant provinces, in which class New Mexico would doubtless fall, acting under the advice of certain other officials (2 White Recepilacion p. 66). Section 3 provides that all persons
236 holding grants made after 1700 should exhibit their title to the proper officer for confirmation, and that a failure so to do should result in their being "deprived of and ejected from such lands, and grants of them made to other persons."

In 1754 the government of Spain was that of an absolute monarchy, and it is not for us to question the right of the King to compel holders of titles theretofore given to apply for confirmation. It was therefore necessary for the then claimant of the Jose de Leyba Grant to obtain such confirmation. Without it his grant became void and he could at any time be ejected by the sovereign, or any other person to whom the same land was equally granted. There is no documentary proof before us of any such application, or of any confirmatory action by the Spanish Governor or other officer. It is not unlikely that the certificate of confirmation would be endorsed on, or attached to the original grant papers, but no such certificate appears though the original *is* in evidence. It being incumbent upon plaintiff to show that his grant was perfect, its confirmation became a necessary element in his proof. No such evidence having been introduced, the grant must necessarily be held imperfect, unless such confirmation is to be presumed from the surrounding facts and circumstances.

Counsel for the defendant claims that such presumption arises in this case, and cites U. S. v. Chavez, 175 U. S. 520 and U. S. v. Pendell, 185, U. S. 196. These cases hold that from a long and uninterrupted possession the law may presume such formal instruments as are requisite to title. In the Chaves case the grant claimant was in the actual possession of the land claimed by him at the time of his petition to the Court of Private Land Claims, and there had been a long uninterrupted possession both under Mexico and the United States. The court says that such continuour possession on the part of the claimant and his predecessors in interest had been shown from some time prior to 1785, inferentially from 1716, and from that kind of possession, coupled with the other circumstances of the case, found the presumption sufficient upon which to base judgment.

237 In the Pendell case the Court of Private Land Claims affirmatively found:

"That the land included in the said out-boundaries continued in the possession of the land grantee, his heirs, legal representatives and assigns, from the time of the making thereof prior to the year 1790, down to the present time, and that the petitioners herein have succeeded in part to the rights of the said original grantee."

It will thus be seen that the proof of possession of the grants in those cases was absolutely, unquestionable, uninterrupted and continuing to the time of the Court's decision. It is on this kind of possession that the court bases its presumption of title.

In this case the plaintiff was not in possession of any portion of the grant at the time of the commencement of the present proceeding, and no one of his predecessors, in interest had been in possession since the American occupation. The various documents bearing date prior to 1840 show a claim of ownership rather than actual use, and the title claimed may or may not have been accompanied by possession.

Counsel for Plaintiff seek to invoke the principle that a statute once established, is presumed to continue until the contrary appears and to substitute this principle for proof of possession. We have examined all of the cases cited in illustration of the application of this principle and find none in which it has been held sufficient to support a presumption of a grant or confirmation of a grant.

In discussing this phase of the question of the character of the Jose de Leyba Grant, the Court of Private Land Claims, said:

"The evidence as to settlement and occupation of the tract purporting to have been granted, continuity of possession, cultivation, residente, improvement, claim of ownership, notoriety of the grant and knowledge of its existence in the community or by the oldest inhabitants now living, is so vague, contradictory and uncertain as to be almost wholly wanting."

238 "In as much as the grant was made at the date mentioned, 1728, it falls under the requirements of the Royal Ordinance of 1754, which provides that all grants made subsequent to 1700 unless already confirmed by royal order of the King or his viceroys, or Presidents of the Audiencias of the several districts embracing the lands granted, should apply for such confirmation as a prerequisite to validity. There is no evidence in this case either by the documents presented or otherwise, that these requirements of the ordinance of 1754 were ever complied with. Nor is there in the nature of the case or upon any of the facts in evidence any grounds that will justify a presumption of such compliance with the requirements for confirmation."

With this conclusion we agree.

Counsel asserts that the facts in this case are different from those before the Court of Private Land claims and Supreme Court of the United States, and points out the will of the son of the original grantee in 1783, disposing of this land, and the deed of the grandson of the grantee in 1834, the informal pledge of the property in 1855 by the aunt of plaintiff's grantor and certain acts of dominion about the same time as not having been before the former courts. But we do not deem these facts, even if properly admitted in evidence, as sufficient to show such possession as would raise the presumption invoked.

It therefore clearly appears that the grant under which plaintiff claims is an imperfect grant, and as such furnishes no basis for an action of ejectment.

This conclusion renders it unnecessary to examine the other questions raised. The judgment of the Court below will be affirmed. And it is so ordered.

FRANK W. PARKER,
Associate Justice.

We Concur:

IRA A. ABBOTT, *A. J.*
EDWARD A. MANN, *A. J.*
JOHN R. McFIE, *A. J.*

Mills, C. J., having tried this case below did not participate in this decision. Pope, A. J., having been of counsel took no part in this decision.

239 TERRITORY OF NEW MEXICO,
Supreme Court, ss:

I, Jose D. Sena, Clerk of the Supreme Court of the Territory of New Mexico, do hereby certify that the above and foregoing two hundred and thirty eight pages, contain, a true full and complete copy of the record and proceedings, pleadings and opinions, in the above entitled cause, as the same appears of record and remain on file in my office at Santa Fe, New Mexico.

Witness, my hand and the seal of the Supreme Court of the Territory of New Mexico, this the fifteenth day of September, A. D., 1908.

[Seal Supreme Court, Territory of New Mexico.]

JOSE D. SENA,
Clerk Supreme Court of New Mexico.

240 THE UNITED STATES OF AMERICA:

To The American Turquoise Company, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, wherein Mariano F. Sena, was plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as the said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the Supreme Court of the Territory of New Mexico, this the 4th day of September, A. D., 1908.

[Seal Supreme Court, Territory of New Mexico.]

WILLIAM J. MILLS,
Chief Justice, Etc.

Service of the above citation is hereby acknowledged this 16th day of September, 1908, at Las Vegas, New Mexico.

AMERICAN TURQUOISE COMPANY,
By STEPHEN B. DAVIS, JR.,
One of Its Attorneys of Record.

Endorsed on cover: File No. 21,347. New Mexico Territory, Supreme Court. Term No. 73. Mariano F. Sena, plaintiff in error, vs. American Turquoise Company. Filed October 1st, 1908. File No. 21,347.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 73.

MARIANO F. SENA, PLAINTIFF IN ERROR,

vs.

AMERICAN TURQUOISE COMPANY.

IN ERROR TO THE SUPREME COURT OF NEW MEXICO.

HARRY S. CLANCY,
FRANK W. CLANCY,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 73.

MARIANO F. SENA, PLAINTIFF IN ERROR,

vs.

AMERICAN TURQUOISE COMPANY.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The brief for defendant in error is able, attractive, and plausible, but is more remarkable, as we will hereinafter show, for that which it omits—for its failures to meet what is set up in our original brief—than it is for what it actually sets out. This will be apparent as we proceed with this hurried attempt by way of reply.

FIRST.

As to what is to be reviewed by this court.

Counsel for defendant appear now to have discovered, as shown under the first point of their brief, that when both parties to an action at law ask the court to direct a verdict, the appellate court is limited to an ascertainment of whether there is evidence to support the court's finding of facts. Our

original brief, in its first, second, and third points, was constructed on this theory, to show that, so far as the district court approached any finding of facts, it had no support in the evidence; while the fourth, fifth, and sixth points combated the defense of the statute of limitations as to which the court made no definite finding; and the seventh, eighth, and ninth points discussed errors in rulings on the pleadings, which, among other things, raised a question of estoppel upon which the court found in our favor.

The court's finding of facts, if it really made any, appears on pages 172-3 of the printed record. Condensed, it will be seen that the court said that the western and southern boundaries were imperfect, the western boundary because the Cerrillos grant comes over the boundary, and the southern because it is doubtful "where that line is." He also says he is "inclined to think the statute of limitations would be good, and if the statute of limitations would be good, that defense would also be good"; and that "as to the question of estoppel, I don't think there has been anything shown here which would act as an equitable estoppel."

Premising that any conflict of this grant with the Cerrillos grant made sixty years later could not be tried in this case, we submit that the learned judge's finding of doubt as to the southern and western boundaries is fully met and overcome by what is presented under the second and third points of our original brief. It should be said that the judge of the district court did not say or mean that the boundaries as stated in the grant papers were imperfect, but he shows that the evidence to identify and locate them was not satisfactory to his mind, and that is the full extent of his finding on that matter. This will be apparent by reading all of the quotation at page 20 of defendant's brief, but it is a *non sequitur* to conclude, as he did, that as a matter of law the title is imperfect because he had some doubt as to the exact location of the southern boundary. He did

not express doubt as to the location of the western boundary, and there is no room for doubt, as we have shown in our original brief. As to the southern boundary, we have also shown that the evidence does not admit of any doubt of its being located south of the Coyote Spring, which spring is clearly within the grant, and the land sued for is far inside of the western and southern boundaries—that is, far east of a north and south line through the unmistakable Peñasco Blanco de las Golondrinas, and far north of the Coyote Spring which is necessarily north of the south boundary. The northern and eastern boundaries are not questioned.

As to the southern boundary, the court goes only so far as to say "The line on the south is also, I think, very doubtful—as to where that line is," but there is no finding as to there being even a doubt as to the property sued for being north of that boundary and within the grant.

This so-called finding of facts leaves the door open to an extended examination of all the evidence and seems, in itself, to be definitely conclusive of no material fact.

SECOND.

As to possession by the grantee and his descendants, which raises presumption of confirmation under royal instruction of 1754.

Notwithstanding the fact, as pointed out in our original brief, that this court in effect declined to affirm the decree of the court of private land claims upon the ground stated by that court of a lack of confirmation or approval under the royal instruction of 1754, and practically invited plaintiff to continue, in the ordinary courts, his assertion of title to the property, counsel for defendant see fit to devote much space to the discussion of the alleged defect in plaintiff's title because of the claimed lack of such confirmation.

In view of the opinion of this court in 189 U. S., 242, we had given less attention in our original brief to this subject than we otherwise would. Strengthened as our case now is, beyond what it was when this court would not look with favor upon this objection, it seemed unnecessary to go further into the matter.

We now feel compelled to make some direct reply to what appears to us to be unfair statements in defendant's brief, and to suggest, by way of further reply, that the decree or instruction of 1754 never was in force in New Mexico.

Beginning on page 11 of defendant's brief, counsel, fairly enough, at first state that the argument of plaintiff (erroneously called defendant in error) is "that although there is no record proof of confirmation the evidence as to possession of the grant is such that confirmation will be presumed"; but this is followed by an imputation to plaintiff of an attempt to prove possession through mere claims of title and by a calm assumption "that for more than ten years prior to the commencement of this action the land has been in the actual adverse possession of defendant in error." This entirely avoids and ignores the arguments in our original brief, under the first point thereof, as to presumption of continuance of possession when proved once to have existed, and, under our sixth point, as to the insufficiency of defendant's evidence to prove such actual continuous possession as the statute requires, to neither of which is any answer anywhere attempted, and is followed by a plausible, but unsound and inaccurate, effort to show that the grant of 1728, the will of Simeon de Leyba of 1783, and the deed of 1834 by Salvador Antonio Leyba to Juan Angel Leyba, indicate no more than mere claims of title and contain no evidence of ownership or possession. We assert the contrary, and will briefly show the correctness of our position.

First, as a part of the original grant documents, we have

the act of juridical possession, executed May 25, 1728, by the alcalde mayor of Santa Fe, in pursuance of the order and authority given by Governor Bustamante on May 24, 1728 (erroneously copied and printed as May 29, 1728), which shows actual, formal delivery of possession, on the ground, of the land granted, with the usual solemnities of such delivery under the Spanish law, which were much like those constituting livery of seizin at the common law (*Record*, p. 32). After the lapse of nearly two centuries it would be difficult, if not impossible, in any case to produce better or more satisfactory evidence that a grantee entered into actual possession of his land.

Therefore the presumption of the continuance of that possession, set out at pages 22 to 24 of our original brief, becomes applicable, together with the rule that the burden of proof is on him who disputes the continuance of the possession.

The further evidence demonstrates the wisdom and correctness of the presumption invoked, as we have, second, the will of the son of the original grantee, made October 15, 1783, more than fifty-five years after the delivery of juridical possession, clearly showing both ownership and possession (*Record*, pp. 45 to 47). The testator recites that he finds himself at his ranch, far from home, and believes himself unable to live or be moved, in consequence of a mortal blow from an unbroken mule, and the officer who wrote the will certifies that it was executed "at this place of the Coyote Spring"; and the testator sets out that he has a grant given to his deceased father, Joseph de Leiba, in 1728, and that "In said grant there is constructed a ranch at the Coyote Spring, a small house, two rooms and a small kitchen, a little tower, a large corral of poles, two corrals for young animals, a corn-crib not very large with corn and beans, a hut (*jacal*) in the temporal lands." No will could contain more definite, substantial statements of actual

possession, use, and occupation, and all under the very title in question.

A little explanation seems necessary. The testator was following a very general practice in Spanish wills of enumerating all of his possessions, and of debts due to and from him, of which at least one instance has come to the attention of this court.

Bergere vs. United States, 168 U. S., 80-1.

The little tower (*torreon*) mentioned in the will was a circular stone building made for refuge from, and defense against, hostile, savage Indians. Such towers were common in New Mexico.

The "temporal lands" are lands dependent upon rainfall for necessary moisture to raise crops, as distinguished from irrigable lands; and the use of the phrase in the will, coupled with the fact of the existence of a *jacal* in such lands, seems to imply that there were both irrigable and temporal farming lands in the grant, and that the latter were at a considerable distance from the ranch buildings at the Coyote Spring, as it was necessary to build a hut for the use of those who planted them. It is true that at the present time the water at the Coyote Spring does not appear sufficient for irrigating purposes, but aqueous conditions may have been different 127 years ago.

Can there be any doubt that the possession in 1783, under the grant, was a continuation of an unbroken possession from 1728, over fifty-five years in duration, of which twenty-nine years were after the royal instruction of 1754? This alone ought to be enough, but there is more.

Again we invoke the presumption of continuance of possession, and find its application again justified by the third undisputed piece of documentary evidence, the deed in 1834 by Salvador Antonio Leyba, the only son and heir of Simeon de Leyba as shown by the will of 1783, to his

son Juan Angel Leyba (*Record*, p. 48). The grantor conveyed all his right which came to him by inheritance "in the rancho of the Cyote Spring with its houses and corrals, together with the grant in which the said ranch is situated," the grant being identified by its date, the name of the original grantee, and its boundaries. It is also in evidence that afterward the grantee in the deed, Juan Angel Leyba, was killed by Indians at the Ojo del Coyote, at his own ranch, after his son Salvador was born (*Record*, pp. 52-3), Salvador being about the same age as the witness Felipe Pino, who was born in 1839 (*Record*, p. 51). How long it was after Salvador was born that his father was killed is not shown by the evidence. The fact, as shown by the deed, that in 1834 there were houses and corrals at the Coyote Spring, within the grant owned by the then only descendant of the original grantee, coupled with the fact that Juan Angel was killed at that ranch five or more years later, corroborates the propriety, if corroboration be necessary or admissible, of the application of the presumption of the continuance of the possession of 1728 and of the possession of 1783. This possession, continued for more than 110 years from the time of the grant, and for more than eighty-five years after 1754, must be enough to meet the most exacting requirement as to evidence of possession.

Under these circumstances, what possible thing could have been done, or step taken, to add to the strength, validity or perfection of this title by the Mexican government, from which the United States acquired New Mexico in 1848, after it had had dominion and control for over a quarter of a century? The answer must be that nothing could have been so done, and, if so, this title was perfect within the definition agreed to on both sides of this case. The royal instruction of 1754 certainly disappeared with Mexican independence, if it had not been abandoned sooner by the Spanish government. Moreover, it was not self-

executing, any more than any Spanish or Mexican law under which denouncements might be made and forfeitures declared, and the Leyba title never having been forfeited under Spain remained unassailable under Mexico. It was a perfect title by the Spanish law of prescription, if in no other way. We believe it to be clear that there never was any foundation for the assertion by the court of private land claims, quoted with approval by the Supreme Court of New Mexico, that confirmation under the order of 1754 was "a prerequisite to validity" of a grant made prior to that year.

THIRD.

Was the instruction of 1754 ever in force in New Mexico?

This question presents peculiar difficulties. There is no proof whatever in the records and history of New Mexico that the royal order of 1754 was there ever in force or observed. Promulgation, in each jurisdiction, was, under Spain, necessary to put any law or public order there in force. Thus, a law might be in force in Santa Fe at one time and in Albuquerque at another, a week or a month later. There are numerous records of such publications to be found in the Spanish archives of New Mexico, but none of this order of 1754. The absence of such record, however, would not in itself be conclusive, or, indeed, of any very great importance, as the archives are not continuous or complete, but may be of some significance in connection with other circumstances from which we may be forced to believe that the Spanish authorities never considered this order adapted to conditions in New Mexico and never caused it to be put there in force.

The instruction itself, while in one place, in the recital or preamble which precedes the ordering portions, the word

mercedes (grants) is used, yet, in all other parts speaks only of sales and compositions (or adjustments) (*ventas y composiciones*) of royal lands, whereby the royal treasury would be enriched. Now, as far as we have been able to discover, there never was in New Mexico, under the rule of Spain, a single case of a sale or composition of royal lands.

We will, later, revert to what was actually done in New Mexico as to the making of grants—a matter of such general, historical nature that this court will take judicial notice of it—but will first call attention to the provisions of the instruction of 1754, to show that they never were applicable to New Mexican grants like the one now under consideration.

The first section provides for the appointment, by the viceroys and presidents of the Royal Audiencias, of subdelegates, or deputies, to take charge of the *venta y composicion* of the royal lands, to whom should be sent their respective appointments with a copy of the instruction, and for the continuance of the subdelegates, or deputies, already in existence, with authority to both classes further to delegate their power to others in places distant from their residences.

It can be asserted that no such subdelegates, or deputies, were ever appointed or known in New Mexico at any time.

Section 2 does not appear to be of any importance to this discussion.

By section 3 of the instruction, the principal subdelegates, or deputies, upon receiving the instruction, and their appointments, are directed to send general orders to the justices of the principal places in their respective districts, to be published in the same manner as general orders from the viceroys, in order that all persons in possession of royal lands since the year 1700 up to the time of the publication may come before the subdelegate, or deputy, to show by what title they hold possession, with notice that they may be dispossessed and the lands given to others if they fail

to present their titles within the time fixed. If such publication had been made in New Mexico it would have been at seven different places, and it is strange that no record of it can be found if it ever was made.

Section 4 of the instruction relates to lands held by sale or composition made by subdelegates, or deputies, before 1700, or by prescription, and is not material to the present case.

Section 5 of the instruction is the important one, and that upon which defendant's counsel principally rely, and they quote a translation of it in full on page 8 of their brief. It is to be noted that they quote from White's Recopilacion, although the translation to be found in Reynold's Spanish Law, at page 53, is a much better one. It provides, in substance, that possession of lands sold or adjusted (not "compromised" as in White) by subdelegates, or deputies, after 1700, are not to be molested, provided they have been confirmed by the king or by viceroys and presidents of the audiencias; but those who possess lands without such confirmation must come to ask it before the audiencias or the officers to whom this power is given by this new instruction, who, in view of the process, or report, of the subdelegates, or deputies, as to the measurement and value of the lands and of the title issued, shall examine as to whether the sale or composition was made without fraud or collusion and for proportionate and equitable prices, with the presence of attorneys general (*fiscales*), so that if it appears that the price of the sale or composition and the tax of *media anata* have been paid to the royal treasury, and after performing whatever pecuniary service appears necessary, the confirmation may issue in the royal name.

Section 6 provides that in cases of sales and compositions, not confirmed since 1700, if it appear that the lands have not been surveyed or appraised, the confirmation shall be suspended until survey and appraisement, and in accordance

with the greater value which may result therefrom the pecuniary service shall be regulated.

Sections 7, 8, and 10 do not seem to be of importance to the matter now under consideration.

Section 9 provides that the confirmations of the sales and compositions shall be by the audiencias, when the attorney general (*fiscal*) has passed on them, and the audiencias shall fix the pecuniary service which must be made for the new grant.

Section 11 gives the audiencias jurisdiction of appeals from the subdelegates or deputies.

Section 12 provides that in provinces distant from the audiencias, mentioning a number by name, "and others in like circumstances," which might include New Mexico, confirmations shall be made by their governors with approval of the royal officers and of the acting attorney general (*teniente general letrado*) where there is one, with authority to decide appeals from the subdelegates, or deputies, in each of such provinces, without resorting to the audiencias.

Section 13 relates to the proceeds of sales and compositions and of the pecuniary service arising from confirmations, and to the manner of keeping account thereof and of reporting the same to the king, while section 14 provides as compensation to the subdelegates, or deputies, two per cent of the proceeds of the sales and compositions.

It will be apparent, as the most obvious and prominent feature of this instruction, that it was intended as a revenue-producing measure, and it is a historical fact, of general notoriety, that there never was a time in New Mexico, under the rule of Spain, when revenue could have been derived from the sale or composition of lands in that jurisdiction. The poverty of the people, combined with remoteness from any possible market for surplus products and almost continuous warfare with savage Indians, made life a struggle for mere existence, and to these conditions must be attrib-

uted the fact that no subdelegate, or deputy, was ever appointed, no presentation of titles ever made, and no confirmation thereof by governors or audiencias ever had.

The Spanish archives in the office of the surveyor general at Santa Fe show records of about seventy grants of land from 1700 to 1754, and over twenty more before the end of the century, of which many have been confirmed as perfect titles by the court of private land claims and a few so held to be by this court, but not one of them ever received any approval or confirmation under the instruction of 1754. A number of other grants of the 18th century have been produced from private custody, but in no case has there come to light any confirmation, or attempt to obtain such confirmation. The instruction of 1754 was practically nonexistent in New Mexico.

In the archives in the office of the surveyor general at Santa Fe, No. 1271 is a draft of a letter from the acting governor of New Mexico, Joseph Manrique, to Nemecio Salcedo, Comandante General de las Provincias Internas de Nuevo España, dated November 16, 1809, which is instructive, as it contains a statement of how grants of land had been made in New Mexico. The letter shows that it is in answer to one from Salcedo asking for information as to the extent of the land for which Francisco Ortiz had petitioned, about which the acting governor had previously written, and also as to the forms, terms, and considerations with which grants had been made in New Mexico, and after answering the first question the writer proceeds as follows:

> "The customary practice of making similar grants has been exercised by this government without giving any notice to (or calling to the attention of) any higher authority, giving attention always to the need which was made to appear by the inhabitants of this province who have been steadily increasing: For this purpose they have presented petitions similar to that which I sent to your lordship with my

communication No. 160 of the 30th of June last, and the government, convinced of the needs of the claimants, has ordered that the *alcaldes mayores* of their respective territories (or jurisdictions) should put the settlers in possession, measuring the sitios and formalizing the grants in the name of His Majesty, upon the condition of their forming houses or organized settlements, breaking and cultivating the farming lands, enjoying the pastures and other lands of the sitios in common, and of fencing as far as possible the cultivated fields, but this last ordinarily is without effect. This has been the course which has been followed up to the present time, and in this way have been given all the grants which the inhabitants of this province possess; but as I desire to be careful in everything and not to risk, in any way, exceeding my power, I sent to your lordship the said petition with what appeared to me to be a proper report, in order that your lordship might consider it."

There is no reason to doubt the accuracy of the foregoing statement by Governor Manrique, which is, however, corroborated by all the records of all the grants made during the 18th century in New Mexico.

Reverting to the order of 1754, it is to be noted that in itself it calls for its own publication or promulgation, in the same manner as the general orders of viceroys. Such publications were well known and frequently made in New Mexico, and the Spanish archives, now in the Library of Congress, furnish numerous records of such publications, which follow the general requirements of the law on this subject, which are set out in the following translation from the great *Diccionario de Legislacion y Jurisprudencia* of Joaquin Escriche, edition of 1847:

"PROMULGATION.—The formal publication of a law for the purpose of giving notice thereof to all. The 12th law, title the 2nd, book 5, of the Nov. Recop. has the following to say on this point: 'In ac-

cordance with the law, and with what has been the practice in regard to all decrees made, let it be known to the people of this court and of the other settlements of this kingdom, that no law, rule, or general new decree, shall be observed or enforced unless it shall have been previously made known or published by means of ordinance, schedule, order, edict, writ, or by crier, by officers of justice, or the public magistrates; and any one arrogating unto himself the authority to put into execution, or who shall feign or announce the existence, on his own personal responsibility, of any laws or uncertain rules or statutes of government, or, instead, seditious matters, written or verbal, with or without signature, in papers or anonymous letters, without there previously existing any of the above prescribed circumstances and requisites, shall be punished by the ordinary authorities as a conspirator against the public peace; and for such purpose he is declared henceforth to be a state prisoner, and the privileged proofs shall avail against him; and to carry the foregoing into effect, and to avoid the abuses which have been experienced, let this decree be printed and a certified copy of the same sent to the chamber of the court alcaldes, that they may make it known to the public by proclamation; and (copies) to the chancellors, courts, and other magistrates of the kingdom, so that they may observe it and publish it in the usual manner, and care for exact obedience to it.'

"The law once promulgated is in effect, unless the law itself provides for its becoming effective at a different time, as is done on some occasions; however, as long as it is not promulgated it is of no effect, since it does not exist as to the public until after publication. Thus it is that if an individual committed a deed not prohibited by any existing law, and that act were to be included in the list of offenses by a new law not promulgated at the time of its commission, the individual would not incur the penalty prescribed by the new law, even though it should appear that he previously had notice of it. But once the law is published ignorance of it cannot be

> alleged, though there be a great number who truly have no notice of the existence of the law, for *'leges est idem scire, aut debuisse aut potuisse.'"*

The records of such promulgations or publications in New Mexico in the 18th century cover a great variety of matters, including royal orders or decrees, orders of viceroys, and official orders or bandos of the governors, but the manner of publication is substantially the same in all cases. Their number is so great that it would be difficult merely to enumerate them, and to set them out even briefly would require months of preparation. We have examined recently about fifty of such papers, of which there must be many more than one hundred during the 18th century.

There were seven jurisdictions in New Mexico, composed of both Spanish and Indian towns. Publications of matters of general interest affecting the whole people or kingdom were published in all the jurisdictions, but some things of local importance in only a portion. Of the seven there were the three Spanish Villas of Santa Fé, Santa Cruz de la Cañada, and Albuquerque, and the Spanish town of Bernalillo, which included three Indian Pueblos, and the others covered Indian towns only.

A fair sample of an order by a governor as to publication may be found in a bando of Juan Ignacio Flores Mogollon, Governor, dated December 16, 1712, prohibiting visits to the rancherias of savage Indians. Following the substantial part is the order for publication, of which the following is a translation:

> "And in order that all of the foregoing may come to the knowledge of all, and that no one may pretend ignorance, I order that it be published in this said Villa, with the sound of the military instruments in an assemblage of all the neighborhood at the usual (or customary) places; and this done, let

> it go to all the jurisdictions, going first to that of the Cañada in order that its alcalde mayor may make it public (or may publish it) adding a certificate of having done so, and from there, let it proceed to that of Taos, and being published, then to that of Pecos, and from there to the Villa of Albuquerque and other jurisdictions of Bernalillo and the Queres, whose alcaldes mayores may perform its requirements, adding a note (or certificate) of the publication, and, when completed, return it to this government office."

Another bando by the same governor, dated April 20, 1714, relative to stray animals, the using, selling, and trading of which he stigmatizes as stealing, has added to it the certificates by the different alcaldes mayores of publications, at Santa Fé on the same day; at Albuquerque on April 22; at Isleta on April 23; at Laguna on May 6; at Jemez on May 13; at San Felipe on May 13; at Santa Cruz de la Cañada on May 19, and at Taos on May 23.

The publication of another, including a royal cedula of great importance, is certified in different form. This is the order of Governor Juan Domingo de Bustamente, dated September 3, 1724, which sets out in full the communication he had received from the viceroy at the city of Mexico, the Marquis of Cassafuerte, dated June 26, 1724, in which is copied and certified the cedula of Luis I, dated February 3, 1724, announcing his assumption of authority upon his father's resignation of January 10, 1724. The viceroy sends this to the governor of New Mexico, with direction to have it published. The governor in turn appears to have made a copy for each of his jurisdictions, of which four remain, with certificates of the respective publications added, in the Province of Zuni on September 16, 1724; at Thaos on September 9, 1724; at Bernalillo on September 11, 1724; and at Cochiti and San Felipe on September 9, and at Santo Domingo on September 11, 1724.

This clearly shows the method referred to in the instruction of 1754 as to publication, and it is hardly possible that all record of the publication in New Mexico of that instruction would be gone if any ever existed. Moreover, the records show a continuous, steady correspondence of official character between the governors and the viceroys, and, toward the end of the century, between the governors and the comandante general de las Provincias Internas de Nueva España, but no reference whatever therein to the disposal of the lands of the king or to any approval or confirmation by king, viceroy, audiencia or governor.

In 1786 the Ordenanza de Intendentes was enacted, but this does not appear ever to have been promulgated in New Mexico, probably and properly, because by article 10 thereof the governments of New Mexico and other provinces named were continued undisturbed, so that no lands were ever sold or granted in New Mexico in the manner prescribed in that ordinance.

The conclusion seems irresistible that the instruction of 1754 never was in force in New Mexico, as it is certain that it was never observed, nor any proceedings had under it.

A description of the condition of New Mexico, to be found in one of the documents now in the Congressional Library, may assist in understanding why there never were any sales or compositions of royal lands in the province, or confirmations of land titles, and why grants were steadily made like the one now under consideration, and in the manner described by Governor Manrique in his letter of 1809, already referred to.

On October 10, 1746, Domingo Tres Palacios Escandon, Juez Privatibo del Real Derecho de la Media Anata, addressed a communication to the then governor, Joaquin Codallos y Rabal, calling for information as to conditions in New Mexico, and especially as to the ayuntamiento and alcaldes ordinarios of the Villa of Santa Fe, and whether

any governor had paid the media anata, a preceding governor, Enrique Olavide y Michelena, having asserted exemption therefrom, because his office was military in character. In pursuance of directions to take the evidence of the best residents on these matters, Codallos y Rabal, on August 2 to 5, 1747, took the depositions of six residents of Santa Fe, who testified that no governor had paid the media anata because the office was military, and continually engaged in warfare with the Indians, although it was true that the governors also discharged duties political and judicial in character. They also told, in varying language, of the poverty of the people, so great that few, or none, of them ever paid any taxes, which one attributed to the lack of commerce and money, so that rarely was so much as a real to be seen—one-eighth of a dollar—and that the seven alcaldes mayores received no salary and very little or no fees or emoluments on account of the extreme poverty of the people, and that when occasion offered to make campaigns or incursions against the hostile Indians these alcaldes and others would go personally in them. They stated also that for many years, one says for twenty-five years, there had been no ayuntamiento nor alcaldes ordinarios in the Villa de Santa Fe.

Was there any room for subdelegates or deputies, or for sales and compositions of lands in such a region?

FOURTH.

Insufficiency of defendant's evidence of adverse possession.

Defendant's counsel attempt no answer whatever to our clear demonstration, under the sixth point of our original brief, of the insufficiency of the evidence to establish such possession as must be shown to support the defense based on the statute of limitations. They ignore it altogether, and at

various places in their brief (pp. 3, 12, 21, 22, 47, 48) assume, with lofty disregard of what the record discloses, "that these mines have been in the actual, exclusive, physical possession of their claimants for more than the statutory period." They do, on page 23, take sufficient notice of our argument on this point, to say that "It is hardly consistent for defendant (meaning plaintiff) to assert that the facts as to the early possession of the Leyba grant, deduced from mere claims of ownership, are sufficient to raise a presumption of title, and at the same time to argue that the actual possession shown in the mine claimants is insufficient to constitute adverse possession under the statute."

As nothing else is said on this subject, it is not unfair to assert, when we take into account the distinguished ability of our adversaries, that our statement and conclusion as to the evidence of defendant's possession are unanswerable. We have already hereinbefore shown that the early possession of the grant is not "deduced from mere claims of ownership," and that there is no foundation for defendant's plausible and deceptive position on this point.

In this connection, on the same page 23 of their brief, counsel for defendant go on to say: "As to the argument that no taxes were paid on the land, it would seem sufficient to reply that none were assessed, and that the claims were exempt under territorial law." This is not quite ingenuous, and is no reply whatever to our suggestion at pages 47-8 of our original brief. We did not argue that defendant's failure to pay taxes, when none were assessed, in itself constituted a defect in its proof of the statutory adverse possession, but that the statutory requirement as to taxes might evidence a legislative intent not to make the statute applicable to the possession of lands claimed under mining locations, which the same legislature had declared exempt from taxation.

HARRY S. CLANCY,
FRANK W. CLANCY,
Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1910

MARIANO F. SENA,

Plaintiff in Error,

vs. No. 73.

AMERICAN TURQUOISE COMPANY.

STATEMENT OF FACTS.

This is an action of ejectment brought by plaintiff as owner of a Spanish grant made in the year 1728 to Jose de Leyba, against defendant to recover possession of a portion of said grant, amounting to something over fifty acres, which is claimed by defendant under mining locations made in pursuance of the public laws of the United States. This grant has heretofore been before this court upon an appeal from the court of private land claims, and it is necessary, in order to make a clear statement of the facts, to begin with a brief recital of that former case.

That case was begun by the present plaintiff in error in the court of private land claims, September 29, 1899, to obtain the confirmation by that court of the grant already mentioned, which was made by the King of

Spain through Governor and Captain General Juan Domingo de Bustamante, on the 25th of May, 1728.

The petition for the land, the grant by the governor, and the act of juridical possession, translations of which will be found at pages 31 to 33 of the record in the present case, were a part of the original Spanish archives, which became a part of the records of the office of the surveyor general at the time of the organization of that office in 1855, and no question has been made at any time as to their genuineness or validity. The boundaries of the grant as given in those papers were, on the east by the San Marcos road, on the south by an arroyo called Cuesta del Oregano, on the west by land of Juan Garcia de las Rivas, and on the north by lands of Captain Sebastian de Vargas.

In order to identify the western boundary, there was also presented in evidence in the land court, from the same Spanish archives, a deed dated August 12, 1701, made by Joseph Castellanos to Miguel Garcia de la Riva, conveying the sitio of the old pueblo of the Cienega, and also an extract from the book of the Cabildo, which book was also a part of the Spanish archives in the office of the surveyor general. This book of the Cabildo is one in which there was brief record made of grants presented for that purpose in the year 1713, and by the entry of one of the grants presented, it was made to appear that Juan Garcia de las Rivas was the son of Captain Miguel Garcia, the grantee in the deed of 1701. Other documentary evidence was presented to identify the northern boundary, the lands of Sebastian de Vargas, but this is not now important, as later documentary evidence referring to the Leyba grant shows that

boundary to be a road, the existence and location of which are not disputed.

Oral evidence was presented to show the location of the arroyo called Cuesta del Oregano, as being south and east of the Ojo del Coyote, or Coyote Spring. Later discovered documentary evidence of the year 1783 abundantly shows that that spring was in the grant, thus tending to corroborate the evidence as to the location of the arroyo and cuesta.

The case was submitted to the court of private land claims on the case made substantially as above stated, there being no satisfactory evidence of possession by the grantee and his descendants, except that shown by the act of possession given in 1728, and the court rejected the claim, as will be seen by reference to page 142 of the record of the present case, because there was no evidence of a compliance with the royal ordinance of 1754, nor any evidence to justify a presumption of such compliance, wherefore the title was not a perfect one, and the claim must fail because not presented within the time limited for the presentation of imperfect titles by the act creating the court of private land claims. It may be well to quote the material part of the holding of that court:

> The first question arising is, What is the character of this grant, whether perfect or imperfect? It is claimed by petitioner to be a perfect grant and therefore could be brought into this court at any time, or not at all, under the statute. Inasmuch as the grant was made at the date mentioned, 1728, it falls under the requirements of the Royal Ordinance of 1754, which provides that all grants made subsequent to 1700, unless already confirmed by Royal order of the King or his viceroys,

> or Presidents of the Audiencias of the several districts embracing the lands granted, should apply for such confirmation as a prerequisite to validity. There is no evidence in this case, either by the documents or otherwise, that these requirements of the ordinance of 1754 were ever complied with. Nor is there in the nature of the case or upon any of the facts in evidence any ground that will justify a presumption of such compliance with the requirement for such confirmation. It therefore follows that this grant must be held to be not a perfect, but an imperfect grant.

The claimant thereupon took an appeal to this court, but before the case was reached, he made an application to the court for the taking of further testimony, under a provision of the act of congress creating the court of private land claims, submitting a photographic copy and translation of the will of Simon de Leyba, made in 1783, which had been found among the Spanish archives, and asking to take the evidence of Felipe Pino, of Santa Fe, and of Ines Apodaca, at that time about ninety years of age, the mother of Salvador Leyba who sold and conveyed to plaintiff. The court refused to take the evidence of the witnesses named, but received the will.

A little later, by agreement of counsel, certain papers copied from the records of Santa Fe County, New Mexico, which had been discovered by counsel for the United States, were made a part of the record, and thereafter, by a further stipulation, a deed made August 9, 1834, by Salvador Antonio Leyba to his son, Juan Angel Leyba, conveying the grant, was also made a part of the record. Translations of these documents will be found at pages 45 and 48 of the present record.

The will of ~~1728~~ 1783 shows that the testator, being at his ranch, far from home, and having received a mortal injury from an unbroken mule, had sent for a military officer, Salvador Rivera, to write his will. It is made to appear by the will, which attempts to recite all of his property, that his ranch referred to was at the Coyote Spring, where he had a number of small structures, and that the ranch was in the grant which had been given by the King of Spain to his deceased father, Joseph de Leyba, in 1728, the boundaries of the grant being recited as follows:

> On the south the slope (Cuesta) called the arroyo of the Oregano, on the north the road which goes towards Pecos from the Cerrillos, or lands of the Captain Sebastian de Vargas, on the east with the road which goes from Santa Fe to the spring of San Marcos, on the west with lands of the old pueblo of the Cienega, as appears by the original papers, which are to be found in the trunk of my residence at Santa Fe.

The will also declares that the testator had one son, Salvador Antonio, who was his sole heir. The deed of 1834, made by said Salvador Antonio, conveys the "rancho of the Coyote Spring with its houses and corrals together with the grant in which the said rancho is situated," to the son of the grantor, Juan Angel Leyba, and it had been previously shown, by other evidence, that the only son of Juan Angel Leyba, one Salvador Leyba, had conveyed the grant to the plaintiff, Mariano F. Sena.

The papers presented by counsel for the United States from the Santa Fe County records, among other things, include the will of Salvador Antonio Leyba, translation of which is in the present record at page 67,

made March 12, 1856, which gives the names of his four children, one of whom was Juan Angel.

With this additional evidence, which showed unmistakable possession and claim of ownership of the land under the original grant by the son of the grantee in 1783, when he made his will on the grant at the Coyote Spring, and like claim of ownership and possession in 1834, when the owner, grandson of the grantee conveyed the property to his son, the father of plaintiff's grantor, the case was submitted to this court, and while the decree of the court of private land claims was affirmed, yet that affirmance was not on account of lack of evidence of compliance with the requirements of the royal ordinance of 1754, but, in effect, because the court of private land claims was not bound to confirm the grant and that the petition should be dismissed upon the ground of laches, the act of congress creating the court having provided that all proceedings should be conducted as near as may be according to the practice of the courts of equity of the United States. The opinion of the court concludes as follows:

> If this be considered an imperfect grant, the right to file it expired years ago; if it be a perfect grant, as now claimed, we see no reason why the owner may not prosecute his claim in the territorial courts. Without expressing an opinion as to whether this was a perfect or imperfect grant within the meaning of the law, or whether the boundaries might not still be ascertained by a survey, we are satisfied that it is one which the court of private land claims could not be called upon to confirm and that, if for no other reason, the petition should be dismissed upon the ground of laches.
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> *Sena vs. U. S.*, 189 *U. S.* 242.

There was afterwards a modification of the decree of affirmance so that it should be "without prejudice to such further proceedings as petitioner may be advised to take."

The door being thus held open, the plaintiff, within a month thereafter, began the present action, on the trial of which, as we will show, a much stronger case was made than that shown by the record in this court on appeal from the court of private land claims. Attention should be called at this point to the fact that the adverse decision of the supreme court of New Mexico in the present case, is put upon the identical ground which was the basis of the decision of the court of private land claims, of a failure to show compliance with the requirements of the royal ordinance of 1754, and this in the face of the fact that this court had in effect declined so to hold upon the former appeal. It will be apparent that, if this court had so held at that time, there never could have been any further litigation, but this court evidently considered that the will of 1783 and the deed of 1834 went a long way toward raising a presumption of compliance with the requirements of the ordinance of 1754.

This case came on for trial before a jury, and the judge of the court below directed a verdict in favor of defendant, on the ground that the evidence did not show that the grant was a perfect one, because "the western and southern boundaries are very imperfect." (*Record*, p. 172.) The case was removed into the supreme court of the territory by writ of error, and that court decided against the plaintiff upon a different ground from that upon which the district judge based his ac-

tion, and, as already stated, went back to the decision of the court of private land claims, saying that there was a failure to show any compliance with the ordinance of 1754. (*Record*, pages 180 to 182.)

We will now attempt, as briefly as possible, to make a statement of the facts as shown by the record made in the present case. As heretofore stated, this is an action of ejectment, brought to recover possession of portions of the Jose de Leyba grant, situate in Santa Fe County, New Mexico.

The defendant pleaded the general issue and the statute of limitations. It further pleaded, as a third defense, (*Record*, pages 4 to 13), what must have been intended as a species of equitable estoppel, in which was set up, an abandonment, by the owners of the grant, of the possession of the land as early as 1839. Defendant's plea then goes on to set up, at great length, the effect of the treaty of Guadalupe Hidalgo, the passage by Congress of the act to establish the office of surveyor general, the provisions of the 8th and 9th sections of the act, the instructions issued by the Secretary of the Interior to the surveyor general, the failure of plaintiff's predecessors in title to present any claim to the surveyor general, the extension of public surveys over the land in the grant, in 1861, the withholding of the land from entry until 1885, and the subsequent making, by various persons, of mining locations, and the occupation and working of said mines by defendant and its predecessors in title. This plea also set up the acquisition of title by plaintiff, in 1895, the proceedings in the land court, the appeal to this court and the action of this court. Plaintiff replied to the first

and second pleas and to a portion of the third plea, (*Record,* pages 13 to 18), setting up, among other things, the case in the court of private land claims and the failure therein from causes other than negligence in its prosecution, and that the present suit was commenced within six months thereafter. This was to meet the effect, if any, of the plea of the statute of limitations. Plaintiff denied so much of the third plea as alleged abandonment, (*Record,* pages 15-16), and demurred to the remainder. (*Record,* pages 18 to 20.) Defendant demurred to all of plaintiff's replications to the pleas of the statute of limitations, except the direct denial thereof. (*Record,* pages 20 to 23).

On May 30, 1905, the district court overruled the demurrer of plaintiff, and sustained the demurrer of defendant, (*Record,* page 23), to which action of the court plaintiff excepted, and has assigned the action of the court on both demurrers as error.

Under the ruling of the district court, the plaintiff was compelled to reply to the remainder of defendant's third plea, (*Record,* pages 24 to 26), although he insists that the issues thereby raised were immaterial. It seems probable, however, that those issues did not influence the action of that court, as will appear by reference to what the court said at the time it instructed the jury to return a verdict for defendant. (*Record,* page 171).

After the court so instructed the jury, plaintiff interposed motions for new trial and in arrest of judgment, which were both denied. (*Record,* pages 27 to 29).

In the trial of the case plaintiff offered in evidence the original grant papers of 1728, consisting of the

petition of the grantee, the order of the governor making the grant, and the act of juridical possession, translations of which appear in the record at pages 31-2.

He also offered in evidence the will of Simon de Leyba, made October 15, 1783, at his ranch at the Coyote Spring, in which he declares that he had been married to Feliciana Gonzales, then deceased, and had one son, Salvador Antonio, who was his sole heir; that he owned a grant of land given by the King of Spain to his deceased father, Joseph de Leyba, in 1728, and sets out the boundaries of the property so as to make it plain that the northern boundary is the road from the Cerrillos going towards Pecos, and the western boundary the lands of the old pueblo of the Cienega, and refers to the original papers to be found in a trunk at his residence in Santa Fe. He was undoubtedly giving the boundaries from memory and referred to the lands of the old pueblo of the Cienega as the western boundary, although in the grant papers the western boundary is given as the lands of Juan Garcia de las Rivas. But the correctness of the statement in the will is made apparent by reference to certain deeds put in evidence, mention of which will be hereinafter made, and "the old pueblo of the Cienega" is a better description than the name of Juan Garcia de las Rivas who owned the lands nearly sixty years earlier.

The church record of the baptism of Salvador Antonio Leyba on February 14, 1770, as the legitimate son of Simon de Leyba and Feliciana Gonzales, was put in evidence by plaintiff, (*Record*, page 47). There was also put in evidence a deed, made in 1834, from the said Salvador Antonio Leyba to his son, Juan

Angel Leyba, conveying the grant in question, in which deed the boundaries are given substantially the same as in the will of 1783, (*Record,* page 48).

The will of Salvador Antonio Leyba, made March 12, 1836, recites the names of his four children, including Juan Angel, to whom he had made the deed nearly two years earlier, (*Record,* page 67).

The church record of the marriage of Salvador Leyba, February 3, 1860, shows that he was the son of Juan Angel Leyba, deceased, and Maria Ines Apodaca, (*Record,* page 65), and the oral evidence of Felipe Pino, (*Record,* pages 52 to 55), shows that this Salvador Leyba was the son of Juan Leyba, and the grandson of Salvador Antonio Leyba, and that his father, Juan Angel Leyba, was killed by the Indians near the Coyote Spring, after his son Salvador was born. This Salvador Leyba sold and conveyed the grant to the plaintiff Sena on August 16, 1895, (*Record,* pages 77-8).

Upon the question of the identity and location of the western boundary, plaintiff offered in evidence from the Spanish archives a deed, (*Record,* page 34), dated August 12, 1701, from Joseph Castellanos to Miguel Garcia de la Riba, conveying the sitio of the old pueblo of the Cienega, and another deed dated March 12, 1704, (*Record,* pages 36-7), from the grantee in the preceding deed, to his son, Juan Garcia de la Riba, conveying the same sitio of the old pueblo of Cienega, and giving the boundaries thereof, of which the eastern boundary was the Peñasco Blanco de las Golondrinas. Thus we have a well-known natural object, as is shown elsewhere in the evidence, to which we can refer the western

boundary of the Leyba grant, which was described in the original petition of 1728 as the land of Juan Garcia de las Rivas, and in the will of 1783, and in the deed of 1834, as the lands of the old pueblo of the Cienega. By reference to the evidence of Andres C. de Baca, at pages 38 and 69-70, and to the evidence of Felipe Pino at page 56 of the record, it appears that the Peñasco Blanco is a conspicuous and unmistakable natural monument, and its location is shown on the map which appears in the record opposite page 50. There can be no doubt of the existence and location of the Peñasco, which marked the eastern boundary of the lands of Juan Garcia de las Rivas in 1704, thus giving us the western boundary of the lands described in the Leyba grant 24 years later, in 1728. There can be no dispute as to this boundary, the only objection heretofore urged, which will be hereafter considered, being that the Cerrillos grant is between the Leyba grant and the Peñasco Blanco, so as to cover a portion of a north and south line running through the Peñasco Blanco.

The southern boundary of the Leyba grant, in each of the documents, of 1728, 1783, and 1834, is the same, the arroyo called the Cuesta del Oregano. It will be seen that this involves the identification of two natural objects, an arroyo, or water-course, and a cuesta, or a slope or elevation of ground. We will not attempt at this place to set out the evidence as to these objects, as it must be hereinafter discussed, but it may be said that oral evidence submitted by plaintiff positively identified both the arroyo and the cuesta by name, and that the evidence of defendant merely negatives any knowledge on the part of the witnesses called of objects known by

that name, although the existence of such an arroyo and such a cuesta is clearly shown by those witnesses at places corresponding to what is indicated by the documents above referred to, to the south of the Coyote Spring, the ranch which is shown to be within the grant by the will of 1783, and by the deed of 1834. These two papers show that the grant certainly extended further south than the Coyote Spring, the location of which is shown on the map already referred to, and all of the witnesses agree that there is a cuesta to the south of that spring, and an arroyo coming down to the spring from the east. The complaint at page 2 of the record shows that the lands occupied by defendant are in section 21, township 15 north, range 8 east, which the map aforesaid shows to be more than two miles northwest of the Coyote Spring and a somewhat less distance east of a north and south line drawn through the Penasco Blanco.

The district court held that the title to the grant was not perfect on account of uncertainty or imperfection in the western and southern boundaries, (*Record*, page 172). In other words, it was held that doubt about or difficulty in, the identification of the boundary calls vitiated the character of the title conferred by the grant, and we feel compelled to say that we have been unable to find any precedent to support this doctrine.

The plaintiff has made and filed the following:

ASSIGNMENT OF ERRORS.

Now comes the plaintiff in error, and says that there is manifest error in the record and proceedings in this cause in the court below, and assigns the following as such error:

1. The district court erred in sustaining the demurrer to the replication numbered 2, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

2. The district court erred in sustaining the demurrer to the replication numbered 3, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

3. The district court erred in sustaining the demurrer to the replication numbered 4, to the second amended plea, thus forcing plaintiff to go to trial, without the benefit of what is set up in said replication.

4. The district court erred in sustaining the demurrer to the replication numbered 5, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

5. The district court erred in sustaining the demurrer to the replication numbered 6, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

6. The district court erred in sustaining the demurrer to the replication numbered 7, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

7. The district court erred in sustaining the demurrer to the replication numbered 8, to the second

amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

8. The district court erred in compelling plaintiff to go to trial on the issue tendered by replication numbered 10 to part of the third amended plea, which was an immaterial issue.

9. The district court errer in compelling plaintiff to go to trial upon the issue tendered by the replication to portions of the third amended plea previously demurred to, which was an immaterial issue.

10. The district court erred in directing a verdict for the defendant.

11. The district court erred in refusing to direct a verdict in favor of the plaintiff.

12. The district court erred in holding that the title of plaintiff was imperfect.

13. The district court erred in holding that there was any uncertainty as to the southern boundary of the grant to which plaintiff has title.

14. The district court erred in holding that there was any uncertainty as to the western boundary of the grant to which plaintiff has title.

15. The district court erred in holding that the plaintiff could not recover unless he had a perfect title to the land in controversy.

16. The district court erred in excluding from evidence plaintiff's Exhibit "M". (p. 74 of record.)

17. The district court erred in admitting in evidence location notices of five mining claims, which are defendant's Exhibits 1 to 5 inclusive. (p. 83-4 of record.)

18. The district court erred in admitting in evidence, deeds of conveyance of said mining claims, which

are defendant's Exhibits 6 to 17, both inclusive. (pp. 84 to 88 of record.)

19. The district court erred in admitting in evidence notices to hold and work four mining claims, which are defendant's Exhibits 18 to 21, both inclusive. (pp. 88-9 of record.)

20. The district court erred in admitting in evidence proof of labor on five mining claims for the years 1896 to 1903, both inclusive, which are defendant's Exhibits 22 to 57, both inclusive. (pp. 89 to 94 of record.)

21. The district court erred in admitting in evidence the depositions of Nasario Gonzales and Jesus Narvais, which is defendant's Exhibit 66. (p. 144 of record.)

22. The district court erred in admitting any evidence as to patents or entries under the public land laws. (p. 139 of record.)

23. The district court erred in denying plaintiff's motion for new trial.

24. The district court erred in denying plaintiff's motion in arrest of judgment.

25. The supreme court erred in affirming the judgment of the district court.

26. The supreme court erred in holding the grant to be imperfect. (p. 182 of record.)

27. The supreme court erred in holding that there was no evidence that the requirements of the ordinance of 1754 had been complied with. (p. 182 of record.)

Wherefore plaintiff in error prays judgment of the record, and that the judgment therein contained be reversed, set aside and altogether held for naught, and

that this case be remanded to the supreme court of New Mexico with directions to vacate the said judgment and to enter a judgment in his favor.

HARRY S. CLANCY,
FRANK W. CLANCY,
Counsel for Appellant.

POINTS AND AUTHORITIES.

Preliminary.

The consideration of this case is naturally divided into two principal parts, the first of which is the presentation of the plaintiff's claim of the perfect character of the title to the grant, while the second involves an attempt to show the entire failure of defendant to meet the case by plaintiff. A subordinate division will include the alleged erroneous admission in evidence of depositions on behalf of defendant, and the alleged errors of the district court in its rulings on demurrers, with one anticipatory point as to the validity of the deed to plaintiff, under which he claims.

The case will be discussed under separate and distinct headings, which it may be well here to enumerate:

First.—The title to the grant is perfect.

Second.—The evidence clearly identifies and locates the boundaries.

Third.—Even if there were doubt about the location of the boundaries, the title would not be thereby affected.

Fourth,—Defendant offered no evidence of ownership, or of claim under color of title.

Fifth,—The evidence of mining locations and of claim thereunder, offered to support the defense of adverse possession, was incompetent.

Sixth,—There was no evidence of actual possession for the statutory period.

Seventh,—Laches is no defense, and there is no room for the application of equitable estoppel.

Eighth,—Plaintiff was deprived of the benefit of facts set up in reply to the plea of the statute of limitations.

Ninth,—Depositions taken for use in the court of private land claims, were improperly admitted in evidence, if the court were correct in sustaining demurrer to replication.

Tenth.—The deed to plaintiff is valid.

FIRST.

The title to the grant is perfect.

The grant was made in the year 1728. At that time, there does not appear to have been any limit to the power of the governor and captain general of New Mexico as to the granting of lands belonging to the royal domain. He was the representative of the king in this regard. It seems certain that he was subordinate to the viceroy at Guadalajara and, in some respects, at least, subject to his orders, but, so far as the records disclose, he did not report to that superior officer the giving of lands to those who applied for them, nor did the viceroy ever give any attention to the making, revising or confirming of any grant in New Mexico. Numerous grants made in the eighteenth century in

the same manner as this one, have been held by the court of private land claims, to be perfect titles, such as the Nicolas de Chaves grant made in 1739, the Ana de Manzanares grant made in 1716, and the Antonio Sedillo grant made in 1769.

A Texas statement of the distinction between perfect and imperfect titles, will be instructive:

> The distinction between perfect and imperfect titles, under the government of Coahuila and Texas, has been often discussed in this court, and resulted in the acknowledgment of the distinction, and resting it on the following basis, that is to say: If the grant were to receive no further act to constitute it an absolute title to the land from the legal authorities, taking effect *in presenti*, it was a perfect title, requiring no further action of the political authority to its perfection. But if something remained to be done by the government or its officers, such title or right was imperfect; and until it received the sanction of the political authority it could not claim juridical cognizance.
>
> *Hancock v. McKinney, 7 Tex.*, 384.

In the present case the title was in such condition at the time of the acquisition of the country by the United States in February, 1848, that nothing which might have been done by either of the former governments or its officers could have added to the strength or validity of the title.

It is true that the court of private land claims held that there should have been a confirmation under the royal ordinance of 1754, and rejected the claim because there was no evidence of such confirmation, nor any evidence which would raise a presumption of a compliance with the ordinance. We cannot now urge that this was incorrect with the record as it then stood; but

later, after documentary evidence had been added showing possession and ownership certainly down to 1834, one hundred and six years after the making of the grant, and eighty years after the ordinance of 1754 was made, this court was unwilling to follow the court of private land claims on this point, and affirmed the judgment on a different ground, "but without prejudice to such further proceedings as petitioner may be advised to take," and distinctly refused to decide whether the grant was perfect or imperfect, and said, if the grant were perfect, there was no reason why the owner might not prosecute his claim in the territorial courts.

Sena v. U. S. 189 *U. S.* 242.

It is also true that the supreme court of New Mexico, in the present case, notwithstanding the opinion of this court, and in spite of the fact that there was other additional evidence, reverted to the opinion of the court of private land claims, which had been practically repudiated by this court, and, in apparent and professed conformity with the case in 7 Texas, 384, above cited, held the title imperfect for lack of compliance with the ordinance of 1754. But we respectfully submit that the supreme court of New Mexico is wrong in this position with the record of the case as now presented, and that the long-continued possession and assertion of ownership for more than a century, under the governments of both Spain and Mexico, raise a conclusive presumption of compliance with the ordinance of 1754, and must be considered as sufficient to put the title beyond question.

U. S. v. Chaves, 175 *U. S.* 520-24.

U. S. v. Pendell, 185 *U. S.* 196 *to* 200.

Certainly, at the time of the cession of New Mexico to the United States in 1848, nothing remained to be done, by the Mexican government, to make perfect the title.

The above-cited case of *U. S. v. Chaves,* is of special interest in this connection. There was no such clear, direct, complete evidence of a grant as is here presented. Two grants were involved, of which one was made to Antonio Gutierrez, in the year 1716, but there was no record or evidence of any delivery of possession, which this court has declared to be essential.

Van Reynegan v. Bolton, 95 *U. S.* 35.

No direct evidence of the making of the other grant was presented, but it was mentioned and referred to in deeds made in 1734 from which it appeared that title to the two grants had been united in Diego Borrego, who in 1736 conveyed to Nicolas Chaves. There was no further evidence of title or possession from this time until 1785, when the property appeared in the inventory of the estate of Clemente Gutierres. Then many years later appeared deeds from heirs of Gutierres to the grandfather of the claimant, Chaves, conveying the eastern part of the grants, while evidence was presented showing that there had been some similar conveyance to the Indians of Isleta for the western part of the grant. Possession was shown under these conveyances. The court had no difficulty in holding the titles to have been "complete and perfect at the date when the United States acquired sovereignty," notwithstanding the absence of evidence as to the original grants, and the lack of any connection between the original grantees and

the claimants, Chaves and the Pueblo of Isleta. In the present case, we have complete and indisputable evidence of the original grant, of the descendants of the grantee, of the acquisition of the title by plaintiff, and of continued possession under the grant.

It is certainly sufficient for plaintiff to show that the title was complete and perfect before the cession of New Mexico to the United States. There is absolutely no evidence introduced in the present case to show any imperfection or defect in the title. With the original papers in language which shows the giving of a title of the most absolute character,—quite equal to what we call a title in fee simple,—followed by indisputable documentary evidence of occupation and possession for more than a century, if the title has been in any way divested, the burden is on defendant to show it, and the presumptions are all in favor of its continuance.

Ownership and possession having been clearly shown in 1728, 1783 and 1834, it is to be presumed, in accordance with a well-established rule, that they continue unless their cessation is proved by evidence, and the burden of proof is upon him who disputes their continued existence.

Lazarus v. Phelps, 156 *U. S.* 205.
Gray v. Finch, 23 *Conn.* 513.
Leport v. Todd, 32 *N. J. L.* 128.
Bayard v. Colefax, 4 *Wash. C. C.* 41-2.
Kidder v. Stevens, 60 *Cal.* 419.
Table Mountain Co. v. Wallers Co., 4 *Nev.* 220
Bates v. Pickett, 5 *Ind.* 22.
Lind v. Lind, 53 *Minn.* 51

Anderson v. Watt, 138 *U. S.* 706, *and cases cited.*

Adams v. Slate, 87 *Ind.* 575-6.

Sullivan v. Goldman, 19 *La. Ann.* 13.

Thomas v. Hatch, 3 *Sumn.* 182.

Clements v. Hays, 76 *Ala.* 280, 284.

Cargile v. Wood, 63 *Mo.* 514.

Gilleland v. Martin, 3 *McLean*, 491.

Higdon's Heirs v. Higdon's Lessees, 6 *J. J. Marsh.*, 51.

O'Gara v. Eisenlohr, 38 *N. Y.* 299.

Best on Presumptions, 186.

There is a legal presumption of continuance. A partnership once established is presumed to continue. Life is presumed to exist. Possession is presumed to continue. The fact that a man was a gambler twenty years since justifies the presumption that he continues to be one. An adulterous intercourse is presumed to continue. So of ownership and non-residence.

Wilkins v. Earle, 44 *N. Y.* 172.

In 1840 it was held by the court of Queen's Bench that a custom of the city of London proved to have existed from time immemorial till 1689, must be taken to exist still, if there be no further evidence proving or disproving its existence. It appears that evidence was given of its exercise from an early period down to 1689, but no proof of its having been exercised, or interfered with, at any later time.

Scales v. Key, 11 *A. & E.* 819, 824-5-6.

If the seizin of a party, at a given time, is proved or admitted, the legal presumption is that such seizin continues, and the burden of proof is on

him who alleges a disseizin; and that burden remains on him, even after he has given *prima facie* evidence of a disseizin.

Syllabus in *Brown v. King*, 5 *Metc.*, 173.

Currier v. Gale, 9 *Allen*, ~~252~~ 325

The plaintiffs, on the trial, having shown a clear documentary title to the premises in dispute, the defense rested solely on the claim of adverse possession. The burden of proof was, therefore, upon the defendants. It was incumbent upon them to establish the fact of adverse possession beyond a reasonable doubt.

Royland v. Updike, 28 *N. J. L.* 101.

Presumptions of law are rules of law, whether disputable or the contrary. If the disputable presumption is not contradicted or removed by evidence, it is a rule of law to be applied as inflexibly as a presumption that is indisputable or conclusive; in other words, a presumption of law that is disputable, when not changed by evidence, becomes to the court a rule indisputable for the case, and the court is bound to apply it.

A status once established is presumed by the law to remain, until the contrary appears. (*See People v. Feilen*, 58 *Cal.* 218); or as a like rule is expressed, in the Code of Civil Procedure (*See Section* 1963, *sub-division* 32), "that a thing once proved to exist continues as long as is usual with things of that nature."

Kidder v. Stevens, 60 *Cal.*, 419.

There is, however, in the present case, evidence on the part of the plaintiff of use and possession of the grant after the cession of the country to the United States, which evidence was not in the record when the former case was considered by this court, and this evidence is not contradicted by anything presented on behalf of defendant. It should be borne in mind that the

record shows that Juan Angel Leyba, to whom the title of the grant was conveyed in 1834, was killed by the Indians after his only son, Salvador Leyba, was born, and that Salvador must have been born about 1839. (*Record*, pages 52-3). It is also shown, by the same witness, that Salvador Leyba was raised by his aunt, Josefa Leyba, and evidence was offered to show that in 1855 Josefa Leyba made a sort of informal pledge of the grant to Jose M. Pino, for the payment of money loaned. (*Record*, page 74). Acts of dominion and ownership and use of the land were also shown by the evidence. (*Record*, pages 166-7-8).

Mention is made of this evidence to show that the present record is different from that which was submitted to this court in the former case; but in this action at law these considerations cannot be seriously operative, because it can be safely asserted that a complete legal title to land once vested cannot be lost by a mere failure to occupy the land or to retain visible possession of it. It is well settled that failure to use and occupy land never divests the owner of his title. Something more is necessary before he can be deprived of his ownership, and this is quite as true under the Spanish law as under our own.

1 *Morcau and Caleton's Partidas*, 400, 365.
Philadelphia v. Riddle, 25 *Pa. St.*, 263.
3 *Washburn on Real Property, Chap. 2, Sec.* 1.
Robie v. Sedgwick, 35 *Barb.*, 329.
Pickett v. Dowdall, 1 *Wash.* (*Va.*) 115.
1 *Escriche, page* 6 (*Ed. of* 1847).

SECOND.

The evidence clearly identifies and locates the boundaries.

The district court directed a verdict in favor of defendant, on the ground that the southern and western boundaries were imperfect. (*Record,* page 172). Therefore, it becomes necessary to examine the evidence as to boundaries with some care to demonstrate the error in this holding, although the supreme court of New Mexico did not follow it, and it is not unfair to assume that that court was unwilling to put its affirmance on this ground of imperfect boundaries, only because it was convinced that it was not sustained by the evidence. The impression made on the mind of a trial judge by evidence during a long and complicated trial, may often be found to be wrong upon a careful review of the record when the evidence has been transcribed in full from the stenographer's notes.

Reference to the original grant will show that the boundaries originally given are—

on the east, the San Marcos Road;
on the south, an arroyo called Cuesta dèl Oregano;
on the west, lands of Juan Garcia de las Rivas;
on the north, lands of Sebastian de Vargas.

In the will made by the son of the grantee, in 1783, the northern boundary is given as the road which goes towards Pecos from Cerrillos, or lands of the Captain Sebastian de Vargas, while the western boundary is given as lands of the old Pueblo of the Cienega, and in the deed made in 1834, by the grandson of the

grantee, the western boundary is given as in the will made by his father, in 1783.

It does not seem necessary to take up any time in the discussion of evidence as to the northern and eastern boundaries. There is no dispute or question made about them. We will, therefore, under this heading, take up the evidence only as to west and south boundaries. Before proceeding to do so, the attention of the court is invited to the map which appears opposite page 158 of the printed record, and to the fact, in connection therewith, as shown by defendant's pleas, on page 9 of the record, that all of the land occupied by defendant is in section twenty-one to the south of the grant shown on the map as "Cerrillos Grant," which covers less than one-fourth of that section. The location of the land claimed by defendant should be kept in mind throughout the whole consideration of the case.

That the statement of the west boundary in the petition for the grant, is sufficient, is supported by authority.

Land Co. v. Saunders, 103 *U. S.*, 318 *to* 323.

West Boundary.

As has been stated, the west boundary in the original grant, is the land of Juan Garcia de las Rivas, and in the two later papers of 1783 and 1834, it is given as the land of the old pueblo of Cienega. It appears from the documentary evidence, that the statement in the later papers is in no way a variation from that in the original grant. Plaintiff's exhibit "B" is one of the original archives from the office of the surveyor general, and is a deed from Joseph Castellanos to Miguel Garcia de

las Rivas, dated August 12, 1701; and is a transfer of the sitio of the old pueblo of the Cienega, which appears to have been granted by Diego de Vargas to Bernabe Jorje (*Record*, page 34). Following this, plaintiff's exhibit "C" is a deed from Miguel Garcia de la Riba to his son, Juan Garcia de la Riba, dated March 12, 1704, conveying the same property which he had purchased from Joseph Castellanos, and in this deed, the boundaries of the sitio of the old pueblo of the Cienega are set out, the eastern boundary being the Penasco Blanco de las Golondrinas. (*Record*, page 36).

These two deeds plainly show that the lands of Juan Garcia de las Rivas, and the lands of the old pueblo of the Cienega, are the same, and, made as they were, many years before the grant of 1728, there can be no question as to their competency to establish and identify the western boundary of the Leyba grant.

Owen v. Bartholomew, 9 *Pick.*, 525.

Morris v. Callanan, 105 *Mass.*, 129, 132.

The second of these two deeds came from the possession of Nasario Gonzales, a large land-owner at Cienega, and was identified by Andres C. de Baca (*Record*, pages 35-6) as having been in the possession of Gonzales as far back as 1884 or 1885. This witness also states that he is well acquainted with the boundary calls set out in this deed, including the Penasco Blanco de las Golondrinas, the eastern boundary of the old Pueblo grant, which, as the records show, was, at the time of the making of the Jose de Leyba grant in 1728, "lands of Juan Garcia de las Rivas." (*Record*, page 36-38.) He also states that plaintiff's map, (*Record*, op-

posite page 50) shows with approximate accuracy the location of the Penasco Blanco. (*Record*, pages 39-40.) Further, this witness, (*Record*, page 69) locates the Penasco Blanco on the United States government map, the same having been marked thereon by the government surveyor. He also, on cross-examination, (*Record*, pages 70 to 74), shows his perfect familiarity with the natural land-marks and localities in that section of the country, having previously stated that he had known them since he was nine or ten years old. (*Record*, page 38).

Felipe Pino testifies that he is acquainted with the Penasco Blanco, and that the turquoise mines operated by the defendant, would lie to the east of a line drawn south from that Penasco. (*Record*, page 56.) On cross-examination the witness fixes the location of the Penasco Blanco. (*Record*, page 60.)

Diego Mares, a witness for the defendant, is acquainted with the Penasco Blanco, a well known landmark. (*Record*, page 124.)

Alejandro Montoya, defendant's witness, is well acquainted with the Penasco Blanco, and has seen the ruins of an old Pueblo at Mesita Cienega. (*Record*, page 129.)

Nasario Gonzales, 83 years old, whose deposition was read on behalf of defendant, testified (*Record*, pages 147-8) as follows:

> Q. Did you ever hear down in that section of the country of lands called the lands of Juan Garcia de las Rivas?
>
> A. No, sir.
>
> Q. Did you ever hear the lands of the Cienega,

where you live, called the lands of Juan Garcia de las Rivas?

A. No, sir. I have numerous papers, very old papers, as far back as the conquest among them, and I did not find a single paper that mentioned any Garcia.

Q. Any Garcia de las Rivas?

A. No, sir.

Q. These papers to which you refer, did they relate to the lands of Cienega?

A. The lands of La Cienega.

Again, at page 150 of the Record:

Q. Did you ever hear anything about Juan Garcia de las Rivas ever having anything to do with the Sitio de Cienega?

A. *I never heard that said and there is no papers that shows that fact.*

A reference to the testimony of Andres C. de Baca, who made a copy and translation of it, (*Record*, pages 35-6) will show that plaintiff's Exhibit C, (*Record*, page 36), a deed for the lands of the Cienega to Juan Garcia de las Rivas, was in the possession of the witness Nasario Gonzales in 1884 or 1885, and must have been in his possession at the time he gave the foregoing testimony. Further comment on the testimony of Mr. Gonzales is deemed unnecessary.

Jesus Narvais, witness for defendant, whose deposition was read, states that he never heard of any such man as Juan Garcia de las Rivas, or that the lands of the Cienega were ever the lands of that person. (*Record*, pages 153-4.) A reading of all the testimony of this witness will show that he is not very well acquainted with the names of localities in the neighborhood of the Leyba grant. Had he been cross-examined, his ignorance would have been further exposed.

The foregoing summarizes all of the evidence about the Penasco Blanco, and, beyond all question, identifies and establishes it as the eastern boundary of the lands of Juan Garcia de las Rivas, and, consequently, as the western boundary call of the Leyba grant. Its position is shown on the map opposite page 50 of the Record, and, in accordance with the well known rule of surveying grants with such boundary calls, a north and south line must be extended from it to the south to form the east line of the Garcia land, and the west line of the Leyba grant, until it intersects an east and west line drawn from the sotuhern boundary call.

Counsel for defendant urged,in the court below, that the west boundary is uncertain because the Penasco Blanco is outside of what plaintiff claims as the Leyba Grant, and the Penasco Blanco is the eastern boundary of the lands of Garcia de las Rivas, which constitute the western boundary of the Leyba Grant. The Penasco is one point on the eastern boundary of the Garcia lands, through which a north and south line being run, that line makes the eastern boundary of the Garcia lands. An examination of the map at page 50 of the record, will show that the Leyba Grant would reach a portion of that line were it not for the interposition of a part of the Cerrillos Grant,—a grant made in 1788, as will appear by reference to page 157 of the record, sixty years after the Leyba Grant was made, during all of which time, undoubtedly, the Leyba land actually touched, on the west, the Garcia land. At the present time, it is impossible to say whether there was an intentional disregard of the Leyba Grant in the making of the Cerrillos Grant in 1788, or not, and it is

possible that in surveying the latter grant, it may have been made to include more land than was originally granted, and in this connection, attention is called to the map opposite page 94 of the record, which shows a great difference between two government surveys of that grant. However that may be, it is worthy of note that the Cerrillos Grant was made five years after the death of Simon de Leyba, the only heir of the original grantee, and at a time when the owner of the Leyba Grant was a boy only eighteen years of age, as is shown by reference to the record of his baptism at page 47 of the record.

South Boundary.

The south boundary of the grant in the original petition, is an arroyo called Cuesta del Oregano. A cuesta is a slope or rising ground. Oregano means marjoram. The Coyote Spring, which is shown on the map opposite page 50 of the record, is identified by almost every witness who testified concerning it, and it is to be noted that the will of Zimeon Leyba, made in 1783, declares that it is made at the Coyote Spring, and further contains the statement that within the grant, which is described in the will, on page 46 of the record, there is constructed a ranch at the Coyote Spring. Thus, it is made plain that the place at which should be found the southern boundary of the grant, must include the Coyote Spring, and south of that spring we must look for the Cuesta del Oregano, or the arroyo of that name. Positive evidence presented by plaintiff is to the effect that Coyote Spring is in the Arroyo del Oregano and that the cuesta is on the other side of that arroyo.

Andres C. de Baca testifies that he knows the Coy-

ote Spring. (*Record,* page 42) and thinks that it is correctly shown on plaintiff's map found at page 50 of the record.

Felipe Pino testifies that he is sixty-six years of age, and knows the Coyote Spring; that it is situated in an arroyo called the Arroyo del Oregano, lies south of the road from Cerrillos to Pecos, and that he first visited the spring many years ago, and then saw ruins of houses there. (*Record,* pages 55-6, 61.)

Brigido Gabaldon, 69 years of age, testifies that he knows the Coyote Spring; first saw it about 53 years ago, and that it is situated in the edge of an arroyo called the Arroyo del Oregano with hills on each side of it. (*Record,* pages 62-3.)

Eligio Sedillo, aged 75, testifies that he has known the Coyote Spring since 1853, and knows the San Marcos Spring; that the Coyote Spring is situated in an arroyo called "Arroyo del Poleo"; that he knows the Cuesta del Oregano, and it is in front of the Coyote Spring towards the San Marcos Spring; that he knows the arroyo of La Cuesta del Oregano, and that it is south from the Coyote Spring. (*Record,* pages 81-2.)

The testimony of this old man as to the location of the Arroyo of the Oregano is not inconsistent with the testimony of the other witnesses, as that arroyo extends to the southwest of the spring and bears that name until it is joined by the Arroyo de las Gallinas. Below that junction it is known as the Arroyo de la Piedra, identified by many witnesses both for plaintiff and defendant. Sedillo locates the cuesta (slope) of the Oregano in front of the Coyote Spring, and towards the San Marcos Spring. The words "in front of" are

clearly a literal translation of the Spanish "en frente de," and would be better rendered into English as "opposite to." There does not appear from the testimony or the map, to be any other arroyo or slope between the two springs. The Arroyo del Poleo, which no other person appears to have heard of before, may be the affluent of the Arroyo del Oregano shown on the map. While the word "poleo" is given by the interpreter as "weed," (*Record*, page 82) its true meaning in English is "penny-royal." Oregano is the Spanish word for marjoram, and this aged witness may have confused the two herbs, but it is certain that he is informed of the existence of an Arroyo del Oregano in that immediate vicinity. He also locates the cuesta or slope of the Oregano as being in front of, or opposite to, the Coyote Spring, meaning thereby that it comes down to the arroyo in which the spring is located; and the natural inference would be, that the arroyo at the bottom of the slope would bear the same name, there being no other arroyo in the vicinity lying at the foot of such a slope.

Edward F. Bennett, a witness for defendant, testifies that he has never heard of the Cuesta or the Arroyo of the Oregano, but that the Coyote Spring is located in the Coyote Arroyo. (*Record*, pages 97-8.) There is nothing strange about this negative testimony, in view of the fact that the witness states that he speaks very little Spanish, and is not acquainted with Mexican names, (*Record*, page 96) and that he was not at this spring very often, as it was outside of where he was prospecting. (*Record*, page 100.) He says that he has never heard of the Arroyo de la

Piedra, (*Record*, page 102) an arroyo well known to all the Mexican witnesses. He states that he has never heard of the Jose de Leyba Grant, nor has he ever heard of the Sitio de los Cerrillos, a confirmed land grant located in the immediate vicinity of where he has been living for the last 26 years. (*Record*, page 104.) He positively locates the cuesta or slope, however, (*Record*, page 103.) "But the names given by the Mexicans down there I don't understand as well as I do up in the district proper." (*Record*, page 103.)

Michael O'Neil, a witness for defendant. It is quite evident from the testimony of this witness that he knows nothing whatever as to the location of the Coyote Spring. His testimony is so flatly contradicted by other witnesses for the defense, that it is entitled, on this point, to no consideration whatever. He testifies that he has known this spring since 1880, (*Record*, page 111) and states positively that it would be impossible to drive a team of horses across the arroyo at the spring, because there are points where it is from 75 to 150 feet in height. (*Record*, page 116.) This remarkable statement is contradicted by the other witnesses for the defendant, Mares at pages 123-4, Montoya at page 128, and Muniz at pages 132-3. Witness further testifies that he has known the arroyo in which the spring is situated, as "Coyote Canon," and that Andres C. de Baca gave him that name. Mr. Baca (*Record*, page 169) testifies that he could not have told O'Neil that, because he has never know the place by that name, and that there is no such canon in that section of the country. O'Neil says that he has never heard of the Cuesta or Arroyo of the Oregano, nor has

he ever heard of the Jose de Leyba grant. There is nothing surprising about this negative testimony, because, as above shown, he evidently does not know the location of the Coyote Spring; never heard of the Arroyo de la Piedra, (*Record*, page 116) which is, in fact, the water-course which he calls Coyote Canon; never heard of the Sitio de Juana Lopez, and the Sitio de los Cerrillos, two confirmed land grants located in the immediate vicinity of where he has been living for the last twenty-seven years, (*Record*, page 118) or the names of other natural objects; speaks very little Spanish; (*Record*, page 118), is not familiar with Spanish names, and there are a great many names "I get mixed up in." (*Record*, page 117.)

Diego Mares, witness for defendant, never heard of the Cuesta or Arroyo of the Oregano. (*Record*, page 121.) He locates the Coyote Spring and the Arroyo de la Piedra correctly, (*Record*, page 123) and describes a "cuesta" at the spring. (*Record*, page 124.) As in the case of O'Neil, this witness has never heard of the Jose de Leyba grant, nor has he ever heard of three confirmed land grants, the Cerrillos, the Sitio de los Cerrillos, and the Sitio de Juana Lopez, which lie almost at the front door of his residence. (*Record*, page 124.)

Alejandro Montoya, witness for the defendant, knows the Coyote Spring, but has never heard of the Arroyo or Cuesta of the Oregano. (*Record*, pages 126-7.) He locates the spring correctly, although not very clearly, (*Record*, page 128) and while he has been living next door to them for many years, he has never heard of the confirmed land grants of the Sitio de los

Cerrillos, Sitio de Juana Lopez, Los Cerrillos, or Sebastian de Vargas. (*Record*, pages 128-9.) Is it wonderful that he never heard of the Jose de Leyba grant?

Pedro Muniz, witness for defendant, testifies that he is acquainted with the Coyote Spring, but never heard of the Cuesta or Arroyo of the Oregano. (*Record*, page 130.) He was at the spring twice, and on those occasions merely passed by without even stopping to get a drink. (*Record*, page 132.) The testimony of this witness is purely negative in that he never heard of the cuesta or arroyo of the Oregano, and is of no value as to the spring, except as a direct contradiction of the testimony of Michael O'Neil.

Nasario Gonzales, whose deposition was read in behalf of the defendant, knows the Coyote Spring, but has never heard of the Arroyo or Cuesta of the Oregano. He testifies at page 147 that "There is not even a slope there. A cuesta I call a place where you go up the slope, but there is no cuesta there; there is nothing." This statement is directly and positively contradicted by a number of the witnesses for defendant. As a sample of the reckless evidence of this witness, after stating that he had been the owner of the San Marcos grant, he says, at page 149, "The waters of the Coyote Spring are within the grant of San Marcos." A glance at plaintiff's map, page 50, and the government plat, next before page 95, will show the falsity of this statement. The untrustworthy character of the evidence of this witness has been commented on, under the heading of "West Boundary."

Jesus Narvais, an old Cochiti Indian who could neither read nor write (*Record*, page 152), says that

he knows the Coyote Spring, and that the land is hilly in the neighborhood of the spring. (*Record*, page 152.) He testifies that he never heard of the Cuesta or Arroyo of the Oregano (*Record*, page 153), nor of the lands of Juan Garcia de las Rivas, and his testimony generally as to the names of localities indicates, as he expresses it, "I do not understand very much about these matters." (*Record*, page 154.)

The depositions of Gonzales and Narvais were taken without opportunity for cross-examination.

It will be seen that all there is to the evidence of the defense, which has been quite fully set out, is of an entirely negative character only, and only as to the *name of Oregano*. The court is familiar with the established rule as to the relative value of positive and negative evidence, but in addition to this, attention must be called to the fact that nearly all of the witnesses of defendant show the existence of an arroyo in which the Coyote spring appears and of a cuesta or slope to the south of that sypring. It is not too much to say that defendant's own witnesses point out clearly where the boundary must be when we take their evidence in connection with the existence of a ranch at the Coyote Spring, within the grant, shown by the will of 1783 and the deed of 1834. In other words, while defendant's witnesses profess ignorance of the name of *Oregano* as applied to an *arroyo* or *cuesta*, yet they fully agree with plaintiff's witnesses as to the existence of an arroyo and a cuesta at the place which other evidence indicates as the correct location of the southern boundary of the grant.

It is beyond all possibility of question or dispute that

the arroyo and cuesta del Oregano existed in 1728 when Jose de Leyba petitioned for the grant; that they existed in 1783 when Simon de Leyba mentioned them in his will, and that they existed in 1834, sixty-one years later, when Salvador Antonio Leyba mentioned them in his deed to Juan Angel Leyba. There can be no doubt, that these objects must still exist. Witnesses for plaintiff say they do exist and that they know them by name. Against this, witnesses for defendant say, in effect, that, while such objects do exist and at the right place as designated by witnesses for plaintiff, yet they do not know them by the name of Oregano.

In a Kentucky case, from the opinion, which is quite apposite, it appears that there was an entry for "eight thousand acres on Woolper's creek, about eight miles below the Big Miami, to begin about one and a half miles from the mouth of the creek." The court after stating that the creek claimed was sometimes called by the name of Stoney, proceeds as follows:

> From these facts it is apparent, that before and about the date of the entry in contest, the stream upon which it lies was sometimes called and known by the name of Woolper, and that it probably derived its name from the fact that a man by that name held the aforesaid claim upon it.
>
> And this conclusion is strengthened by the consideration that it, for many years past, has gone and now goes by that name. Upon the whole, we are satisfied that, about the time the entry in question was made, it was sometimes called by the one and sometimes by the other name. This circumstance, as it seems not to have been generally known by the name of

Woolper, at the date of the entry, might be delusive to the subsequent locator, and would render the entry bad, if there had not been other objects of notoriety called for, and such description from them, as would enable him to find this creek, and to know with reasonable certainty that it was the one intended.

An object of notoriety is given; namely, the Big Miami, a large stream notoriously known by that name, emptying into the Ohio, the great highway upon which persons most generally traveled in emigrating to this country. And as the entry must lie in Kentucky, and calls for lying about a mile and a half from the mouth of Woolper, which is called for as a creek about eight miles below the Big Miami, the subsequent locator must reasonably have concluded that Woolper emptied into the Ohio below and on the opposite side from the Big Miami. He would, therefore, set out first to find the mouth of the latter stream, as the point approaching in all reasonable likelihood, nearest to the mouth of Woolper, and as the point intended by the call for the Big Miami. Arriving at the mouth, and measuring by the meanders of the Ohio (which, as has been settled by this court, is the proper way to ascertain distances upon it), at the distance of only ninety poles over eight miles, he would find the mouth of a creek of considerable size, emptying into the Ohio; and, upon further search, he would find no other creek emptying into the Ohio for several miles above and below. He could not doubt that the creek found was the one intended, and especially when, upon further search and inquiry, he could find or hear of no other creek at all in the neighborhood, bearing the name of Woolper.

Thruston v. Masterson, 9 *Dana.*, 229-30.

The applicability of what is set out in the last sen-

tences of the foregoing quotation is obvious. In the present case it is shown beyond all possibility of doubt that the Coyote Spring and the ranch house at that spring, where Simon de Leyba made his will in 1783, which are referred to in the deed made by Salvador Antonio Leyba in 1834, must be within the grant, and that therefore the southern boundary must be looked for so as to include the Coyote Spring. The identification of the southern boundary depends upon finding an arroyo and a cuesta. All of the witnesses familiar with the country, except Nasario Gonzales, testify to the existence of an arroyo, and of a cuesta south of the arroyo, going up hill towards the San Marcos Spring. Witnesses for the plaintiff identify this arroyo and this cuesta by the name of Oregano, while witnesses for the defendant did not know those objects by that name. There is no evidence presented of any other arroyo or cuesta corresponding to the requirements of the documentary evidence. There can be no more doubt of the identification of this boundary than there was in the Kentucky case that the creek found was the one intended when there was no other to be found in the neighborhood bearing the name given in the entry of the land. In our case no other arroyo or cuesta can be found anywhere in the neighborhood bearing the name of Oregano.

THIRD.

Even if there were doubt about the location of the boundaries, the title would not be thereby affected.

The position taken by the district court, but, as

should be stated in justice to the judge of that court, without having heard counsel on the point, was that the western and southern boundaries were imperfect, and that therefore, the grant was not perfect, and not being a perfect grant, that the plaintiff had no title. We do not concede for a moment that there is any uncertainty or imperfection about these boundaries, but, if there were, it would not affect the title. Where there is any uncertainty or difficulty about the location of boundaries, that merely makes a question of fact to be passed upon by the jury, but in no case has it ever been thought that any such uncertainty or difficulty in any way impaired the title.

Wilson v. Marvin, 172 *Pa. St.*, 37.
Bushey v. Iron Co., 136 *Pa. St.*, 555.
Berry v. Watson, 122 *Pa. St.*, 227.
Kellum v. Smith, 65 *Pa. St.*, 89.
Greeley v. Thomas, 56 *Pa. St.*, 43.
Brown v. Willey, 42 *Pa. St.*, 208.
Hunt v. McFarland, 38 *Pa. St.*, 71.
Mathers v. Hegarty, 37 *Pa. St.*, 64.
Gratz v. Hoover, 16 *Pa. St.*, 239.
Nourse v. Lloyd, 1 *Pa. St.*, 233.
Comegys v. Carley, 3 *Watts.*, 280.
Schei v. Struck, 109 *Wis.*, 598.
Woodbury v. Venia, 114 *Mich.*, 252.
Brown v. Morrill, 91 *Mich.*, 29
Tasker v. Cilley, 59 *N. H.*, 575.
Ayers v. Watson, 113 *U. S.*, 599 *to* 609.
Abbott v. Abbott, 51 *Me.*, 575.
Cullacott v. Cash Co., 6 *Pac.* 214.
Madden v. Tucker, 46 *Me.*, 376.

Carter v. Clark, 92 *Me.*, 226.
Boardman v. Reed, 6 *Pet.*, 345.
Barclay v. Howell, 6 *Pet.*, 509-10.
Thruston v. Masterson, 9 *Dana.* (*Ky.*) 228.
Smith v. Evans, 1 *Ky.* (*Hughes*) 169.

We venture the assertion that no case can be found indicating that difficulty in identifying boundary calls in a conveyance, has been treated as in any way affecting or impairing the title to the property. The district court may have had in mind some such doctrine as that announced by this court in a California grant case. In that case, it will be seen, however, that one boundary was entirely absent. An examination of everything set out by the court will show that the only boundaries specified were the northern and southern boundaries of a tract of land on the sea-shore with the sea to the west. The eastern boundary was not given, and we quote from the decision of the court as follows:

> Now the grant on which the appellant's counsel relies as conferring perfect title is not the certifying document above referred to, but the previous act of directing possession to be given to Peralta, and the actual delivery of possession to him. It is perfectly manifest that Peralta could not have been put into manual possession of several leagues of land. He could only have been put into possession of a certain part or parts in the name of all: and the exterior boundaries of the tract must have been indicated by language or monuments. But we have no evidence of any description of boundaries, or monuments to designate them, except the bay on one side, and the extreme limits of the tract along the bay. The interior line between those limits is entirely wanting in all the documents thus far presented. The title relied on, therefore, is necessarily imperfect, and

requires some authoritative survey to distinguish what was intended to be granted from what remained in the public domain.

* * * * * *

Leaving out the proceedings of 1844, which are admited to be imperfect, no human being can tell, from the language of the various documents, what was the eastern boundary of the *rancho*. It certainly would seem not to embrace the eastern slope of the hills, as is now claimed; but what it did embrace or where it did run is not ascertainable from any of the documents which have been adduced; and no parol testimony can aid this defect as regards the question now under consideration. Parol testimony was very properly adduced before the commissioners for the purpose of showing where equity required that the line should run, in order to separate the *rancho* from the public domain. But it cannot make that title perfect which was not perfect before.

The supreme court of California, in *Banks v. Moreno*, 39 Cal., 239, 240, well observed:

"The precise point under discussion is, whether or not the title of Peralta, as exhibited by the plaintiff, was a perfect title conveying the fee, and which invested him with absolute dominion over a specific parcel of land without any further action on the part of the United States; or whether, at the time of the cession of California, something remained to be done by the government which was necessary to invest Peralta with a complete legal title to the specific tract.

"In every complete grant conveying a perfect title it is essential that the thing granted be sufficiently described to enable it to be identified. In grants of real estate it is not always necessary to describe it by metes and bounds, or by a reference to actual or artificial monuments, nor by courses and distances. If the tract granted have a well known name, and the boundaries of the tract known by that name are notorious and well de-

fined, a grant of the tract by its name would, doubtless, convey the title to the whole. In like manner, a grant describing the tract by reference to the known occupation of the grantor or another—or to another instrument containing a sufficient description of the premises—would be sufficient. In short, any description will suffice which identifies the land granted with such certainty that the specific parcel intended to be granted can be ascertained either by the calls of the instrument, as applied to the land, or by aid of the descriptive portions of the grant. But it is equally certain that, to constitute a complete and perfect grant to a specific parcel of land, it must, in some method, appear on the face of the instrument, or by the aid of its descriptive portions—not only that a specific parcel was intended to be granted, but it must also be so described that the particular tract intended to be granted can be identified with reasonable certainty. It would be a contradiction in terms to say that a specific tract was granted if there was nothing in the grant by which it could be ascertained with reasonable certainty what particular parcel was intended to be conveyed."

We certainly concur in these views and, therefore, hold that the title of Peralta was an imperfect title, and necessarily required confirmation in order to vest a full legal estate in private parties.

Carpenter v. Montgomery, 13 *Wall.*, 493-4.

From the foregoing quotation, it will be seen that the court was considering a similar question to the one presented here—that is, as to whether the title relied on by plaintiff was a perfect title. As announced by the court, all that is necessary is that the land "be so described that the particular tract intended to be granted can be identified with reasonable certainty." Certainly, the description set out in the Leyba grant is

such that the land intended to be granted can thereby be identified with reasonable certainty, and beyond all doubt it has been in this case so identified, and clearly and necessarily includes the land claimed by defendant, which is far within the boundaries of the grant, no matter what view is taken of the evidence. The court should have directed a verdict for plaintiff.

FOURTH.

Defendant offered no evidence of ownership, or of claim under color of title.

The defense of the statute of limitations set up by defendant is made under the statute of New Mexico, which reads as follows:

> No person or persons, nor their children or heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments, against anyone having adverse possession of the same continuously in good faith, under color of title, and who has paid the taxes lawfully assessed against the same, but within ten years next after his, her or their right shall have come, fallen or accrued, and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments so held, shall be commenced within ten years next after the cause of action therefor has accrued.
>
> *Session Laws of New Mexico of* 1899, *page* 133.

Defendant, however, not only pleaded what the statute requires, but in addition, that it was the owner of the property sued for. The only claim of right made by defendant is under certain mining locations made at different times, for none of which have patents ever

been issued, and it is obvious that no locations of mining claims under the public land laws can give ownership of the land or anything more than the right of possession as long as the locators continue to comply with the federal and local mining laws and regulations.

As to color of title, it will be sufficient to quote the authoritative definition heretofore given by this court, which is as follows:

> The courts have concurred, it is believed, without an exception, in defining "color of title" to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been, whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith.
>
> *Wright v. Mattison*, 18 *How.*, 56.

Certainly, within this definition, it cannot be said that a mining location constitutes color of title, and color of title is absolutely necessary under the New Mexican statute above quoted. When a person makes a mining location he clearly recognizes title to the land in the United States, and what are known as mining deeds transferring such claims all necessarily contain the same recognition. It cannot be said that any such locations or transfers are in appearance title, although in reality no title.

Under defendant's plea, if the evidence does not show ownership, or adverse possession under color of title, certainly no defense has been made under the statute.

An additional requirement of the statute, which is

also pleaded by defendant, is that the party setting up such a defense must have paid the taxes "lawfully assessed" against the land, which evidences the legislative intent not to make the statute applicable to the possession of lands of the United States which could not be lawfully taxed by any one. No evidence was offered or could have been offered, to show the payment of any taxes on the land, all that there is in the record where defendant attempted to meet this requirement of the statute, being found at page 164, from which it appears that the land had never been assessed because mining claims are exempt by the laws of the Territory, as stated by counsel for defendant.

FIFTH.

The evidence of mining locations and of claim thereunder, offered to support the defense of adverse possession, was incompetent.

The possession, claim and occupation set up by defendant are based entirely upon locations made under the mining laws of the United States, and upon nothing else. This should be kept in mind throughout the discussion.

Our statute, hereinbefore quoted, bars any action for lands "against any one having adverse possession of the same continuously in good faith, under color of title, and who has paid the taxes lawfully assessed against the same," except within ten years after the cause of action accrued; and the statute further declares, in effect, that all suits for the recovery of land so held "shall be commenced within ten years next after the cause of action therefor has accrued."

Laws of 1899, *Chap.* 63, *Sec.* 2.

It may be questioned whether there is any limitation as to actions for the recovery of lands not "so held,"—that is, in the manner described in the earlier part of the section, but that is quite aside from the present argument, the object of which is to show that land cannot be "so held" under mining locations.

In a case which came up to this court from the circuit court of the district of Nebraska, it is stated that there was no state statute regulating or defining title by adverse possession, but that there was a statutory provision that an action for the recovery of land could be brought only within ten years after the cause of action had accrued. The case is interesting and instructive because it shows that even under such a statute as that of Nebraska, adverse possession by the defendant is necessary, and the character of such adverse possession is quite clearly defined. The court quotes approvingly from decisions in a number of states, and shows in substance that adverse possession to be effectual must be "the open, actual, exclusive, notorious and hostile occupancy of the land, and claim of right, with the intention to hold it as against the true owner and all other parties." The court then says:

> Tested by these definitions, it is obvious that if the title relied on in this case, by the defendant below, was fully described and characterized by the special verdict, it was defective in two very essential particulars, in that it was not found to have been actual and exclusive. A possession not actual, but constructive; not exclusive, but in participation with the owner or others, falls very far short of that kind of adverse possession which deprives the true owner of his title.
>
> *Ward v. Cochran*, 150 *U. S.*, 608.

It will be noticed how carefully the court indicates that the possession must be not only exclusive of the true owner, but of all others, and, as will be hereafter seen, any admission or recognition by the would-be adverse possessor, of title in any one else than himself, destroys the exclusive character of the possession, which is essential to the validity of the defense. It must be perfectly apparent in the present case that defendant has steadily and consistently taken the position that the title to the land in dispute was in the government of the United States. It has never asserted title to the land in itself. Even after the beginning of the present action, defendant filed an answer distinctly setting out that it was in possession of the land sued for, under the mining laws of the United States, by virtue of various locations, which are specified and referred to in the pleading. The claim of right or title or ownership which the authorities, with but few exceptions, hold to be necessary, is here entirely lacking.

In an Oregon case, suit was brought by a plaintiff who had title derived from a grant made by act of Congress, to aid in the construction of a road, the company constructing the road having filed its selection list, including the lands in controversy, on September 16, 1886, which selection was not approved until January 24, 1894. Defendant relied upon the statute of limitations, and showed that he went into possession of the land in October, 1886, and continued therein until the action was begun, January 31, 1898. The court discusses the case upon the theory, without actually deciding, that the legal title passed from the government September 16, 1886. It is clear that if

the title did not pass until 1894, there could not have been the necessary ten years' possession, as the statute would not run against the government. It appeared that the defendant had insisted that the land was government land, and that he made attempts to get title from the government, under the homestead laws. The trial court instructed the jury that the defendant might admit that the United States or the state was the owner, and, at the same time, hold adversely to the plaintiff, and, by so holding for ten years, acquire title as against the plaintiff. In other words, defendant's possession might be sufficiently adverse to bar the plaintiff, although defendant did not claim the ownership, but only a right to obtain a title from the government under its public laws.

It will be seen that this Oregon case presents almost the identical propositions involved in the present case. The opinion discusses the whole subject at great length, especially citing and considering the few cases to be found opposed to our view, thus fully presenting the whole controversy, and holds as we now contend that such a possession does not meet the requirements of law. The case must be read and studied as a whole, and no attempt will be made to make quotations from it.

Altschul v. O'Neill, 35 *Oreg.*, 202; 58 *Pac.*, 95.

We must not be understood as asserting that a mining claim is not property. Our position is that a duly perfected mining claim gives no title whatever to the land, but only a right to the possession of the land; and he who sets up any rights under a mining claim, precludes himself from asserting in himself any own-

ership of the land. A brief quotation from an opinion of this court will make this plain:

> A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent. (*Forbes v. Gracey*, 94 *U. S.*, 767. XXIV, 314.) There is nothing in the Act of Congress which makes actual possession any more necessary for the protection of the title, acquired to such a claim by a valid location, than it is for any other grant from the United States. The language of the act is that the locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time. Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States. In furtherance of this policy it was enacted, 13 Stat. at L., 441, Ch. 67, Sec. 9; R. E. Sec. 910, that no possessory action between individuals in the courts of the United States for the recovery of mining titles should be affected by the fact that the paramount title to the land was in the United States, but that each case should be adjudged by the law of possession.
>
> *Belk v. Meagher*, 104 *U. S.*, 283-4.

It requires no argument to point out that were it not for the statute last referred to in the above quotion it would not be possible for the locator of a mining claim successfully to maintain ejectment against an intruder, because the locator would have no title upon the strength of which to recover, and the

defendant could defeat the action by showing that title was in the government. The right of possession has been separated from the fee, and any man who claims the possession under a mining location, necessarily cuts himself off from all possible chance, when he comes in conflict with a plaintiff claiming under a title good against the government, and not emanating from the government, from asserting that he has any possession adverse, exclusive and hostile to the whole world.

> In *Altschul v. O'Neill*, 35 Or., 202; 58 Pac., 95 —a case decided before the enactment of the Code of Alaska—upon a careful and well-considered view of the authorities, it was held that to constitute adverse possession there must be, among other requisites, an entry under claim of right hostile to the true owner and to the world, and that an occupant of land cannot hold adversely while he admits the title to be in the United States; thus adopting the doctrine of the United States courts in *Ward v. Cochran*, 150 U. S., 597; 14 *Sup. Ct.*, 230; 37 *L. Ed.*, 1195; *Henshaw v. Bissell*, 18 *Wall.*, 255; 21 *L. Ed.*, 835; *Bracken v. Union Pacific Ry. Co.*, 75 *Fed.*, 347; 21 *C. C. A.*, 387, and *Pillow v. Roberts*, 13 *How.*, 472; 14 *L. Ed.*, 282, in which it was said that possession, in order to be adverse, must be adverse to all the world. We are compelled to hold, therefore, that there was no possession of the disputed premises adverse to the plaintiff in error prior to the date of the issuance of the patent to its mining claim.
>
> *Tyee Consol. M. Co. v. Langstedt*, 136 *Fed.*, 128.

It was not the mere occupancy or possession which must be known to the true owner to prejudice his rights, but its adverse character. (*Alex-*

ander v. Polk, 39 Miss., 737.) It must also be under claim of ownership of the land. (*Magee v. Magee*, 37 Miss., 138; *Davis v. Bowmar*, 55 Miss., 671; *Wilkerson v. Eilers*, 114 Mo., 245.) And as the presumption must be indulged that Foster held in subordination to, and not adversely to, the true owner, it devolved upon plaintiff to show that his possession was adverse, and under claim of ownership. The possession was, we think, of such extent and character, and so open and notorious and inconsistent with, as well as injurious to, the real title, as to raise the presumption of knowledge thereof on the part of the true owners, and the sale of the land and improvements tended to show that the possession was under claim of ownership to the land. But defendant testifies that when he bought Foster's claim "he thought it was government land, and that he intended to make a homestead of it, if it suited him; that he did not find out that it was not government land for three, and maybe four, years after he bought it;" thus showing beyond any and all question that he did not at that time claim the land adversely to the true owner, and did not do so until after he ascertained that the land was not government land, and not subject to be homesteaded, and he then homesteaded another tract. There was therefore no evidence showing that defendant had been in the adverse, open, notorious and continuous possession of the land under claim of ownership for the period of ten years before the commencement of this action, which was necessary to bar plaintiff's action.

Hunnewell v. Burchett, 152 *Mo.*, 611.

The defendants show a continuous possession of the premises, open and notorious, since 1851, but that possession has not been, in my judgment, during this period, or for twenty years, adverse to the title of the plaintiff. To render a possession adverse it must be hostile in its origin, and

hostile in its continuance. The entry upon the premises must be made, and the possession must be accompanied with the claim of the title against the whole world. In other words, the occupant must assert ownership in himself. An entry by permission of another, or, with an admission of another's title, will not set the statute running, and the recognition of another's title after the statute has commenced running, at any time within the twenty years, no matter for how brief a period, will destroy the continuity of the hostile possession, and avoid the bar of the statute.

In the present case Pettygrove, the party through whom the defendants derive whatever interest they possess, went into possession not claiming title in himself, but asserting, as was the fact, that the title was in the United States; and neither he nor his grantees have at any time since pretended that the fact was otherwise, or that they have ever acquired that title.

Adams v. Burke, 1 *Fed. Cas.*, 99.

The third and last instruction given at the instance of plaintiffs, had reference to the question of adverse possession, in its relation to the Statute of Limitations. It's purport was that if plaintiff's title was found to be the paramount title, and any of the defendants entered upon and took possession of the land, without title or claim, or color of title, that such occupancy was not adverse to the title of plaintiffs, but subservient thereto. We think this law to be too well settled to need argument to sustain it. There must be title somewhere to all land in this country. Either in the government, or in some one deriving title from the government, state, or national. Any one in possession, with no claim to the land whatever, must in presumption of law be in possession in amity with and in subservience to that title. Where there is no claim of right, the possession cannot be adverse to the true title. Such is the

rule given as recently as 1854, by the Court of Appeals of Virginia, in the case of Kincheloe vs. Tracewell, 11 Gratt., 605. The court there says: "An entry by one upon land in possession, actual or constructive, of another, in order to operate as an ouster, and gain possession to the parties entering, must be accompanied by a claim of title."

Harvey v. Tyler, 2 Wall., 349.

The decisions of the court have determined the character of the possession which will thus bar the right of the former owner to recover real property. It must be an open, visible, continuous and exclusive possession, with a claim of ownership, such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but adversely to all titles and all claimants.

Sharon v. Tucker, 144 *U. S.,* 541.

See also:

Probst v. Presbyterian Church, 129 *U. S.,* 190-1.

Jackson v. Porter, 13 *Fed. Cas.,* p. 238.

Bowman v. Lee, 48 *Mo.,* 336.

Bracken v. Railway Co., 75 Fed., 349.

Colvin v. Land Assn., 23 Neb. 75.

Smith v. Burtis, 9 Johns., 180.

Bedell v. Shaw, 59 *N. Y.,* 50.

Schleicher v. Gatlin, 85 *Tex.,* 272.

Colvin v. Burnett, 17 *Wend.,* 569.

In presenting this point for consideration of the court, counsel for plaintiff have not overlooked a recent decision of this court which at first glance might appear to be in conflict with our argument. That case was brought up to this court from the Supreme Court of Iowa and the person asserting title by adverse pos-

session of land covered by a railroad grant held his possession under a timber culture entry, and the state court held that there was nothing in the facts of the case to show that the entryman "was not acting in good faith and with the belief that he would acquire title under the land entry under the timber culture act," and this court said that it was not proper to disturb this holding. Further on, near the close of the opinion, it is made more plainly to appear that the decision of this court was in conformity to the general rule of following the construction given by state courts to state statutes.

Land Company v. Blumer, 206 U. S., 495-6.

In the present case no such reason exists for holding against the contention of plaintiff, as the courts of New Mexico have not given any such construction to the New Mexico statute, nor would such decision, if it had been made, be binding on this court as in the case of state decisions. Moreover, there is no resemblance between the wording of the Iowa statute and that of the statute of New Mexico, which we have already quoted, the Iowa statute, so far as material, being as follows:

> Sec. 3447. Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards except when otherwise specially declared:
>
> * * * * * *
>
> 7. *Written contracts—judgments of courts not of record—recovery of real property.* Those founded on written contracts, or on judgments of any courts except those provided for in the next subdivision, and those brought for the recovery of real property, within ten years.
>
> *Iowa ~~Revised~~ Code of* 1897.
>
> Annotated

In adition to this there may be some distinction to be found in the fact that both parties to the Iowa suit were asserting title under the United States, while the plaintiff in this case takes the position that the United States never had any title to the land in question.

We venture to submit to the court that there is nothing in the decision in the Iowa case which can interfere with the court now giving as full consideration to our argument as though the Iowa case had never come to this court.

A still later case, which came from the Supreme Court of Nebraska, of a similar character, by implication, at least, recognizes the correctness of the argument which we make. In that case, also, this court affirmed and followed the judgment of the state court, and used the following language:

> We are clearly of opinion that the possession of Japp and his grantee was adverse in the strictest sense of the term, and the acts of Wiese in seeking to acquire title from the United States under the act of 1887, with the view of removing a cloud upon his title, was not an act of recognition or acknowledgment of a superior title, either in the United States or in the Sioux City Company, operating to interrupt the continuity of his adverse possession, and, in any event, cannot be held to have destroyed a title which had already become perfect by the expiration of the statutory period in Nebraska for acquiring the legal title to land by adverse possession.
>
> *Missouri Land Co. v. Wiese*, 208 *U. S.*, 249.

In the present case defendant has never claimed title, but has always, not only acknowledged, but positively asserted, a superior title in the United States.

SIXTH.

There was no evidence of actual possession for the statutory period.

The defendant has pleaded (*Record*, page 5) that it has had "continuous, exclusive, actual, peaceable, hostile and open possession" of the property for more than ten years before the beginning of the action. This is not sustained by the evidence. The mining locations in evidence, over plaintiff's objections, (*Record*, pages 83-4), the "mining deeds" offered, (*Record*, pages 84 to 88), the notices to hold and work (*Record*, page 88) and proofs of labor on mining claims, (*Record*, pages 89 to 93) show nothing as to "continuous, exclusive, actual, peaceable, hostile and open possession" pleaded by defendant. They prove nothing more than intention to secure and preserve a right of possession claimed under the United States statutes.

The evidence of actual possession must be sought elsewhere. The witnesses to prove such possession are Bennett, (*Record*, pages 99, 101, 102), McNulty, (*Record*, pages 105, 107, 108 and 110), O'Neil, (*Record*, pages 112, 113, 133, 134), Mares, (*Record*, pages 119, 120), and Muniz. (*Record*, pages 129, 130.) Of these, we assert that but one, McNulty, shows anything like possession of the kind required. At page 108 will be found his statement that he kept everybody off the property "from the first part of the year 1894." But the suit in the court of private land claims was begun September 27, 1899, (*Record*, page 11), and this action of ejectment was begun May 4, 1903, (*Record*, page 2).

Let us examine the evidence of these witnesses, of

whom, with the exception noted above, not one appears to give a statement of the kind of possession required.

Bennett, at page 99, says he worked on the Castilian claim in 1889 when Parmelee claimed it, but that he worked for another man who had a lease; that McNulty had been in possession since 1892 or 1893 "I forget the exact date;" that prior to 1892 "Parmalee was in possession of that Castilian mine at one time;" that he, Bennett, located the Muniz claim in 1889 and abandoned it; that later he and John Andrews relocated it, and later the Munizes located and worked it. He further says at page 101, that C. G. Storey was in possession of the Muniz and Castilian in 1888 and 1889 to 1893; and, being asked who were in possession of the five named claims, before McNulty came, at page 102, says Storey was the next before McNulty, and before Storey, the Parmalees were in possession of the Castilian and the ground where the Muniz is; there was a man named Callander there in the early eighties. No claim is made by defendants under Callander.

McNulty, who is in the employ of defendant, at page 105 says he first went to work for Storey; that he had done the assessment work on the claims for each year except one which was exempt; that he worked for Allen and Storey, and later for Andrews and Doty, who "were a company that Mr. Storey wrote me had charge of the property for the sale of stones, etc.," but who do not appear in defendant's claim of alleged title, (*Record*, pages 84-88); and that "they were the American Turquoise Company;" and finally, at page 108, he makes the statement previously referred to that he kept everybody off the property "from the first part

of the year 1894." At page 119 he adds that such possession as he had was under mining locations.

O'Neil, at pages 112 and 113, says that McNulty went to the mines in 1892; that before McNulty, Graves and Storey and Allen were there; that he, O'Neil, leased the Castilian from Marshall in 1880, and the next man there was Milton Parmalee; that the Gem mine first came to his notice in 1894, "by a man named Storey and Allen;" that he was at the Muniz claim the day the Munizes located it, and that he heard about the Morning Star about the same time as the Sky Blue, in 1894.

Mares, at pages 119 and 120, says he is acquainted with the Castilian and Muniz claims only; that Marshall worked the Castilian in 1880; that he does not know who worked it after Marshall; that McNulty was in possession or working them, "more or less" in 1893 or 1894; that Storey worked both the Castilian and the Muniz before McNulty came, "more or less about three years;" that the Munizes worked the Muniz claim before Storey worked it.

Muniz, at pages 129 and 130 ,testifies that he and his brother located the Muniz claim and worked it about a year when they sold it to Storey; that before 1890 he saw Cartwright and Parmelee work the Castilian, and Storey in 1890 and 1891; that he and his brother built a house on the Muniz claim, and after they sold, Storey, and after him, McNulty, lived in the house. The location was made January 31, 1890. (*Record*, page 83.)

The foregoing fairly summarizes all of the evidence of possession for defendant, and argument is unneces-

sary to show that it falls far short of what is required to establish title in defendant, or a bar to plaintiff's action.

SEVENTH.

Laches is no defense, and there is no room for the application of the doctrine of equitable estoppel.

Our excuse for the presentation of this point is the adverse ruling of the district court upon plaintiff's demurrer to defendant's third amended plea, (*Record*, pages 5-13, 18-20, 23), and the fact that defendant's counsel in the court below, seriously argued the converse of these propositions.

The substance, greatly condensed, of that plea, which itself covers a little over eight printed pages, has been set out in the "Statement of Facts" herein, and will not here be repeated. It is one of the most extraordinary pleas ever made in an action at law.

In the portion to which plaintiff's demurrer was addressed, the following faults, failures and neglects are imputed to plaintiff and his predecessors in title, and are set up as defenses to an action of ejectment:

> They failed to avail themselves "of the beneficent provisions provided for their protection" in the act of Congress of 1854 and the regulations thereunder, by presenting a claim for their grant to the surveyor general;
>
> They permitted "without protest, without objection and without notice" mines to be located, opened, "bought in open market" and to be mortgaged;
>
> That "although the courts and offices of the Territory of New Mexico and of the United States were open to and invited" them, "and justice and

common fairness and honesty required," they did not assert their claims so as to apprise defendant;

That in 1895 plaintiff obtained a deed from descendants of the original grantee;

That in 1899 he filed a petition in the court of private land claims seeking confirmation of the grant and prosecuted the same, without success, in that court and in the Supreme Court of the United States.

The above resume of the pleaded wickedness of the grant owners, gives no idea of the picturesque, almost lurid, effect of the great amount of adjective language of the plea, and in that way, perhaps does the pleader some injustice, but it is sufficient for present purposes.

It should be noted that, under the act of 1854 and the regulations, both quite fully set out in the plea, it was in no way obligatory upon grant claimants to present their claims to any one, and the notice published by the Surveyor General (*Record*, page 8,) merely requested grant claimants to come in, although the act of Congress made it his active, positive duty "to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico. (*Record*, page 5.) It is also to be remembered that in 1854 the owner of the grant, Salvador Leyba, was about fifteen years old, in the care of his aunt, Josefa Leyba, who appears not to have been able even to write her own name, (*Record*, page 74,) and in all human probability neither of them ever heard of the "beneficent provisions" aforesaid.

As to the assertion that the courts were open to them, this is incorrect as to the time prior to March, 1891, when the court of private land claims was cre-

ated and the eighth section of the act of 1854 was repealed.

Chavez v. Chavez, 7 *N. M.*, 58, 79-80.
Chavez v. Whitney, 4 *N. M.*, 611.
Tameling v. U. S. Co., 93 *U. S.*, 644.

Comment does not seem necessary as to the other allegations.

The plea seems to be made up of a mixture of imputation of laches in not presenting a claim to the surveyor general, or in the courts incorrectly alleged to be open to claimants, and assertion of a species of estoppel because plaintiff or his predecessor in title did not come forward and prevent the location of mining claims on the grant.

We deny that plaintiff, or his grantor, has been guilty of any laches of which defendant has any right to complain, but we cannot admit that laches can be set up as a defense in an action which is essentially an action at law, although under the new procedure which now prevails over the greater part of the country, equitable estoppel may be urged, and, indeed, other equitable defenses.

First, as to the doctrine of laches, we assert that it is one peculiar to courts of equity and applicable only to equitable suits, and cannot be set up in actions at law as to which the legislature has prescribed fixed and definite periods of limitation. Laches on the part of the plaintiff may defeat his suit in equity without regard to any statute of limitations, but what would any court say to counsel who would gravely urge laches as a defense to an action on a promissory note, even though a code provided that equitable defenses may be

pleaded in all actions? The proposition is unthinkable, but it would be no more unreasonable than the attempt in the present case.

The position of defendant's counsel on this question, evinces what appears to be a confusion of ideas as to the effect of the reformed pleading and practice. It is contended that the code makes equitable defenses admissible in actions at law like the present one, and defendant's counsel appear to think that this transforms actions at law into suits in equity, and that they are to be decided by the application of equitable doctrines, without regard to the essential nature of the case. It requires but little reflection to perceive the fallacy of such a position. That which can be set up as an equitable defense to an action at law, under the code, must, necessarily, be of such a character as would have been sufficient prior to the adoption of the code, to invoke the interposition of a court of equity on behalf of the defendant, against the unrighteous prosecution of the action at law. No case can be found justifying such an interposition on the mere ground of laches.

Probably this is the first time that an attempt was ever made, in defense to an action of ejectment, to set up that the claim of a plaintiff is "in the catalogue of stale claims, against which the doors of a court are closed, independent of statutes of limitation," as was asserted by defendant's counsel in the supreme court of New Mexico.

We must not be understood as contending that equitable defenses may not be set up in actions of law. For the present, we are willing to concede the general proposition, although there is much reason to doubt its

correctness, that in New Mexico, now, such defenses may be made even in actions of ejectment although there can be no doubt that it could not be done when this action was begun and when the third amended plea and the demurrer thereto were filed. It may be well to quote the statutes. The statute as to ejectment, oringinally enacted in 1847, except section 3167, which was adopted in 1893, so far as material, is as follows:

> Sec 3160. The action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises.
>
> Sec. 3163. Any person claiming such premises may, on motion, be made a defendant.
>
> Sec. 3164. It shall be sufficient for the plaintiff to declare in his petition that on some day, in such petition named, he was entitled to the possession of the premises, describing them; and that the defendant, on a day named in the petition, afterwards entered into such premises, and unlawfully withheld from the plaintiff the possession thereof, to his damage, for any sum he may name.
>
> Sec. 3165. The defendant may plead, Not guilty, and under such plea give in evidence any testimony showing that the plaintiff is not entitled to such possession, or that the title is in some other person.
>
> Sec. 3167. The action shall be prosecuted in the real names of the parties, and may be brought against the tenant in possession, or against the person under whom such tenant holds or claims possession.
>
> Sec. 3172. If the plaintiff prevail, the judgment shall be for the recovery of the possession, and for the damages and costs.
>
> *Compiled Laws of* 1897, pp. 801-2.

It will be seen that the legislature contemplated nothing more than an action at law.

In 1897 the legislature adopted a "Code," a paragraph of one section of which is as follows:

> The defendant may set forth by answer as many defenses and counter claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.
>
> *Sub-section* 41 *of Section* 2685, *Compiled Laws of* 1897.

Another section was as follows:

> The former practice in law and equity shall be retained in all cases and proceedings not comprehended within the terms and intent of this code.
>
> *Sub-section* 179 *of Section* 2685, *Compiled Laws of* 1897.

It was the general opinion of the bar of New Mexico that this excluded ejectment from the effect of the new legislation, but in 1903 there was another act:

> Section 1. That sub-section 175 of section 2685 of the Compiled Laws of New Mexico of 1897 be amended so as to read as follows:
>
> "Sub-Sec. 175. This act shall not apply to or in anywise affect the actions in *habeas corpus*, *mandamus*, prohibition, *Quo warranto*, replevin, attachment, ejectment, eminent domain, suits for partitioning real estate, actions to determine and quiet the title of real property, proceedings for the sale of real estate of infants, except as to the form of the action and all process in the above-mentioned actions, suits and proceedings shall be issued, served and made returnable in the manner and time in accordance with the provisions of section 2685 of the Compiled Laws of New Mexico of 1897 unless such process is otherwise directed

to be issued, served and made returnable by the laws relating to said above-mentioned actions, suits and proceedings."

Laws of 1903, *ch.* 5.

The legislature in 1905 returned to the subject and made another effort:

Sec. 6. Section 1 of the act of the legislative assembly approved February 19, 1903, being Chapter 5 of the acts of the 35th legislative assembly, is hereby amended so as to read as follows:

Sub-Section 175 of Section 2685 of the Compiled Laws of New Mexico for 1897 be and the same is hereby amended so as to read as follows: All statutes in force at the date of the passage of this act, (section 2685) or enacted since then, or hereafter enacted, relating to habeas corpus, mandamus, prohibition, quo warranto, replevin, attachment, ejectment, eminent domain, suit for partition of real estate, actions to determine and quiet title to real property, proceedings for the sale of real estate of infants, shall not be held to be repealed by the enacting of said section 2685 of the Compiled Laws of 1897, but said section 2685, and all other statutes relating to said subject shall be constructed together as if all of said laws were enacted at the same time, and shall receive such construction from the court as to harmonize the same as parts of one act, and no repeal shall be held to have been made by implication or conflict, except so far as may be necessary to harmonize the said laws and give effect to them as one uniform system.

Section 6, *Chapter* 114, *Laws of* 1905.

Conceding then, for the purpose of this argument, that equitable defenses may be applicable to ejectment in New Mexico, we still insist that the essential nature of the action is not changed and that no new rights are

given to a defendant. He is merely given the opportunity to set up by way of defense that which formerly would have been sufficient as a foundation for a suit in equity, either to enjoin the prosecution against him of an action at law, or to obtain independent relief. Laches cannot be such a foundation.

That our position as to the effect of abolition of forms of action and the admission of equitable defenses in actions at law, is correct, will be apparent from a cursory examination of what is, perhaps, the best authority on the subject.

Pomeroy's Eq. Jur. sections 84 *to* 87, 354, 1369.

But plaintiff has been guilty of no laches of which defendant can complain. This court has indicated that there was such laches that the United States, acting through the court of private land claims, created by an act of Congress which required its proceedings to be in accordance with the practice of the courts of equity of the United States, was not bound to confirm, but it does not follow that defendant can take advantage of that laches.

Plaintiff is asserting a legal title, as to which the legislature has provided a distinct ten-year period of limitation. Plaintiff, or his grantor, could be guilty of no laches or neglect as to the cause of action against defendant until that cause of action arose, and it arose only when defendant's exclusive and continuous possession began, and the only approach to such possession indicated by the evidence, as we have shown under the Sixth point of this brief, is in the

statement of McNulty that he kept everybody off, from some time in 1894.

As to equitable estoppel, the argument is equally strong, and is well supported by authority. The judge of the district court distinctly declared that nothing had been shown which would act as an equitable estoppel, and there was no more in the pleading than in the evidence.

A fair test of the admissibility of this defense in this action can be had by an answer to the question of whether, as a plaintiff, the defendant could maintain ejectment upon a title resting upon such a foundation, or could enjoin the prosecution of the action against him. This is not even supposable under such a statute as ours.

Foster v. Mora, 98 *U. S.*, 428.
Smith v. McCann, 24 *How.*, 406-7.
Claggett v. Kilbourne, 1 *Black*, 348 *to* 350.
Fenn v. Holme, 21 *How.*, 488.
Hooper v. Scheimer, 23 *How.*, 249.

It is undoubtedly true that there are cases where the defense of an equitable estoppel may be interposed in actions of ejectment, even without the aid of a statute.

Dickerson v. Colgrove, 100 *U. S.*, 578, 580.
Kirk v. Hamilton, 102 *U. S.*, 76.

An examination of the two cases just cited, will show what are the essential elements of such a defense and how different they are from anything in the present case. The important thing which is lacking in the present case, is the existence of an obligation or duty of the party sought to be estopped to give infor-

mation to the other party, and generally even some degree of turpitude in his conduct is essential.

Bigelow on Estoppel, 5th Ed., 596.
Ditch Co. v. Irrigation Co., 27 *Colo.*, 274.
Viele v. Judson, 82 *N. Y.*, 32. 40.
Horn v. Cole, 51 *N. H.*, 287.
Chapman v. Chapman, 59 *Pa. St.*, 214.
Franklin v. Meyer, 36 *Ark.*, 114.
Bramble v. Kingsbury, 39 *Ark.*, 134.
Rector v. Board, 50 *Ark.*, 128.
Bartlett v. Kander, 97 *Mo.*, 361.
Henshaw v. Bissell, 18 *Wall.*, 271.

A brief quotation from a recent case seems peculiarly applicable:

> Putting the case in the most favorable light for the plaintiffs, it was only a case of estoppel by silence. Indeed, it was not even an ordinary case of estoppel by silence, but an estoppel by silence concerning facts of which defendants may have had no actual knowledge. To constitute an estoppel by silence there must be something more than an opportunity to speak. There must be an obligation.
>
> *Wiser v. Lawler*, 189 *U. S.*, 270.

EIGHTH.

Plaintiff was deprived of the benefit of facts set up in reply to the plea of the statute of limitations.

The facts pleaded in the replications, to which reference is thus made, will be found on pages 13 to 18 of the printed record, in paragraphs numbered from 2 to 8, both inclusive. Upon demurrer by defendant, these paragraphs were held bad, and on this argument

they are to be taken as true. Upon examination, it will be seen that they set up various breaks in the running of the statute, if our view of the law is correct. tI is shown that defendant is a foreign corporation; that it did not, by filing the required papers in the office of the secretary of the Territory and in the office of the recorder of any county, comply with the statute as to foreign corporations, until the 28th of December, 1899, and that prior to said day there was no officer or agent of defendant upon whom service of process could be made. It is also shown that the property referred to in the plea of the statute of limitations is the same property which, in March, 1892, was conveyed to another corporation of the same name as defendant, which was also a foreign corporation, and did not comply with our statutes governing foreign corporations, until February, 1897. It is also shown that in June, 1897, the property was conveyed at a judicial sale to two persons who were non-residents and absent, so that service of process could not be made upon them, or either of them. It is also set up that plaintiff, in September, 1899, began an action in the court of private land claims, which he prosecuted diligently and without negligence, but failed therein from causes other than negligence in its prosecution, and that the present suit was begun within six months thereafter.

It will be seen that the general idea upon which these replications are based, is that the running of the statute is suspended during so much of the time, as it is not possible to get service of process upon the alleged holder of the property. So that, even if we ad-

mit that Chauncey G. Storey may have been in the possession of the property in 1892, yet, when he transferred such title as he had to a foreign corporation upon which no service of process could be made for nearly five years thereafter, the statute cannot be considered as running during those fice years; and when four months later, the special master sold the property to non-rsidents upon whom no service of process could be made, the running of the statute was again suspended, and cannot beconsidered as again in operation until December 28, 1899, when the present defendant, the grantee of those non-residents, complied with the law regulating foreign corporations.

The first thought which arises in the mind upon the statement of these propositions, is naturally as to the frequently announced rule, that when a statute of limitation has begun to run, nothing subsequently occurring will stop it. While this is true as a general principle, yet there are exceptions which, as this court has said, the courts in this country have engrafted upon such statutes.

Braun v. Sauerwein, 10 *Wall.*, 221-2-3.

In the case just cited, the suspension of the statute was brought about by the disability of the plaintiff to sue, in consequence of a prohibiton in an act of congress; but there is no difference in principle between this and his inability effectively to sue because he can not get service on the defendant. This is clearly recognized and distinctly held in another case in this court. In that case the defendant, a corporation, pleaded a five years' statute of limitation. The statute of the state provided that when the defendant was

a corporation having a managing agent in the state, service of summons might be made upon such agent, and in instructing the jury, the judge of the circuit court spoke as follows:

> If you find that the defendant had a managing agent within the state at the time of the loss, then the statute began to run from that time, and if it had such agent in the state for the next five years after the loss, then this action is barred, but otherwise it is not. In other words, to bar this action the plaintiff must have been able, for five years before suit brought, to have sued the defendant in this state, and compelled it to answer the suit by a service upon a managing agent therein. The time during which the plaintiff is thus disabled from suing by reason of defendant having no managing agent in this state, is not to be counted as part of the five years' limitations.
>
> *Express Co. v. Ware*, 20 *Wall*, 543.

This court in its opinion very briefly said that they saw no error in the charge. This case is very nearly like the present one.

In a California case, it appears that a statute of that state distinctly provided that a failure on the part of a foreign corporation to comply with statutory requirements similar to ours, should preclude the corporation from the benefit of statutes of limitation. The court held that such compliance was a necessary fact to be proved by the corporation, in order that it should avail itself of the benefit of the statute of limitation. The court then goes on to hold that the general rule is that foreign corporations come within the provisions of the statutes of limitation which make a saving as against absent debtors, such corporations being, in contemplation of law, absent from all other states than the one

of their creation, and that therefore the statute was not to be regarded as a limitation upon the right to plead the statute, but as conferring the right subject to the condition prescribed. In other words, unless the local statute confers the right to do so, foreign corporations have no right to plead the statute of limitations.

Pierce v. Southern Pacific, 40 *L. R. A.*, 352.

While we have no statute in New Mexico in terms providing that foreign corporations may plead the statute of limitations, yet their right to do so may fairly be inferred from the language used in section 445 of the Complied Laws of 1897, hereinafter quoted, which section contains the requirements about filing a charter or articles of incorporation in the office of the secretary of the Territory and in the office of the recorder of deeds, and the making and filing in the same offices of a certificate designating the principal place of business and an agent upon whom process may be served. After setting out these requirements, this section says that "Such corporations shall have the same powers," "as corporations of a like character organized under the general laws of the Territory." This may be considered sufficient to permit the setting up of the statute of limitations, but only upon condition of a compliance with the requirements aforesaid of the statute.

In New York it is held absolutely that a foreign corporation, even if it has property and an agent within the state, has no right to plead the statute of limitations.

Olcott v. Tioga R. Co., 20 *N. Y.*, 221 *et seq.*

Rathbun v. N. C. R. Co., 50 *N. Y.*, 656.
Boardman v. Lake Shore R. Co., 84 *N. Y.*, 157.

The decisions are based upon the peculiar wording of the New York statute, which was afterwards copied by Nevada, where the same rule is followed.

Robinson v. Imperial Co., 5 *Nev.*, 44, 76-7.
Barstow v. Union Con. Co., 10 *Nev.*, 386.
State v. C. P. R. Co., 10 *Nev.* 47

Reference is made to these cases particularly because in Nevada it was held that the same rule must be applied in cases relating to the possession of real estate, notwithstanding the fact that there might be some person in possession of the property for the foreign corporation.

That a foreign corporation is to be regarded as a non-resident within the meaning of a statute which declared that non-residents might be sued in any county in the state, is perfectly plain by reference to another case in this court where it appeared that the foreign corporation had complied with the statute about appointing agents.

R. R. Co. v. Estill, 147 *U. S.*, 607 *et seq.*
6 *Thomp. Corp., Sec.* 7841.

The statute of New Mexico on this subject is as follows:

> Section 445. Every company or corporation incorporated under the laws of any foreign state or kingdom, or of any state or territory of the United States, beyond the limits of this territory and now or hereafter doing business in this territory, shall file in the office of the secretary of this territory and in the office of the recorder of deeds of the county in which the principal place of business of such corporation shall be, a copy of its

charter of incorporation, or in case such company is incorporated under any general incorporation law, a copy of its articles of incorporation and of such general incorporation law, and duly certified and authenticated by the proper authority of such foreign state, kingdom or territory. Such company shall, also, before it is authorized or permitted to do business in this territory make and file with the secretary of the territory and in the office of the recorder of deeds of the county in which its principal place of business shall be, a certificate signed by the president and secretary of such company, duly acknowledged, designating the principal place where the business of such company shall be carried on in this territory, and an authorized agent or agents residing at such principal place of business upon whom process may be served, and such corporation shall have the same powers and shall be subject to all the liabilities and duties as corporations of a like character organized under the general laws of this territory.

Sec 445, *Complied Laws of* 1897.

As to the replication which pleads the former action in the court of private land claims, plaintiff's failure therein for causes other than negligence in its prosecution, and the beginning of the present suit within six months thereafter, plaintiff relies upon section 2925 of the Compiled Laws of 1897, which provides that, under such circumstances, the second suit shall be deemed a continuation of the first. That section is as follows:

> Section 2925. If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated be deemed a continuation of the first.

To this replication, the defendant specifies four grounds of demurrer, of which the first, second and third do not seem to call for any special consideration The fourth ground is, in substance, that the replication does not show that suit was instituted by plaintiff against defendant for the recovery of the property, and that such suit was dismissed without judgment upon the merits, and the present suit begun within six months thereafter; and that it does not show that the action in the court of private land claims was for the recovery of the possession of the property or was of the same nature and character or betwen the same parties as the present suit.

As to the first clause of this objection, we take it that the material part of it is that the replication does not show that the former suit was dismissed without judgment upon the merits. If there were a judgment on the merits, we would admit that there had been an adjudication which concluded the plaintiff, but we have, in the replication, followed the language of the statute, and that certainly is all which can be required of us as a matter of pleading. We will take no further time on this point.

As to the second clause, a little more examination may be necessary. With the replication, and as a part of it, are filed the petition of plaintiff in the court of private land claims and the answer of the defendant. It will be seen by a comparison of these papers with the pleadings in the present case, that the action in the court of private land claims was for the same property sued for in the present case, and that the defendant

set up the same defense of the statute of limitations which is now under consideration.

In the court of private land claims there might have been either one of the following judgments:

First, a confirmation of the claim for the whole grant.

Second, a confirmation of the grant excluding the lands claimed by defendant.

Third, a rejection of the whole claim.

No reasonable man will contend that if either the second or third of these judgments had been rendered the plaintiff could thereafter have asserted in any court a title to the lands held by defendant. His claim to those lands would have been adjudicated, and the adjudication would estop him from any further litigation relative thereto. Especially would this be the case if the second of these judgments had been rendered. And no reasonable man can contend that the decision of a case if decided one way, would be *res judicata* as to a plaintiff, and if decided the other, would in no way be binding on the defendant. If plaintiff would be concluded, as between himself and the present defendant, by an adverse decision in the land court, then, it must follow that defendant would have been equally concluded by a decision in that court favorable to plaintiff.

The act creating the court of private land claims in section 6, requires a claimant to set out the names of any persons in possession of or claiming the land or any part thereof, otherwise than by permission of the petitioner, and, as is well known, the land court held this to be a mandatory provision requiring claimants

to make such adverse claimants or possessors parties defendant. This court in considering this requirement, speaks as follows:

> Apparently, however, the only object of requiring notice to be given the adverse possessors or claimants is to compel them to show the location and boundaries of their claims and that they are not mere squatters or trespassers, but hold the land under a grant from the United States, in which case, under section 14, such title from the United States to such other person "shall remain valid notwithstanding such decree." If, however, it appear, as it does in this case, that the petitioners admit that the adverse possessors or claimants do hold under grants from the United States, and there are no disputed boundaries, there would appear to be no substantial reason for making them parties, inasmuch as they could not be affected by the decree. The only consequence of an omission to serve on them a copy of the petition is an acknowledgment of their title and of its boundaries.
>
> *U. S. v. Martinez*, 184 *U. S.*, 346.

Sena made the defendant a party to the action in the court of private land claims because he did not admit that defendant had any title from the United States or any right whatever to the land, and a decision by the land court of the issues raised by defendant's answer would be decisive and controlling in the present litigation, if there ever had been such a decision. As a matter of fact, there never was any such decision, as will be apparent by reference to the case of *Sena v. The United States*, 189 *U. S.*, 242.

To state the proposition in slightly different language, there can be no doubt that if the land court had decided that the title asserted by plaintiff in that

court was perfect except as to so much of the land as was claimed by defendant, or if that court had held that the title was of no validity whatever, the present defendant being a party to that action, defendant would be able successfully to plead in the present case the former adjudication against any claim which plaintiff would assert. This being so, the replication must be held good, and section 2925 of the Compiled Laws as covering this case.

In the supreme court of New Mexico counsel for defendant argued that section 2925 could have no application to actions for the recovery of real estate because it was originally section 12 of the statute of 1880, which created limitations as to actions other than those for the recovery of real estate, and because section 16 of the same act, which appears in the Compiled Laws as section 2929, contains provisions preserving other limitations already existing by statute. That section reads as follows:

> None of the provisions of this act shall apply to any action or suit which, by any particular statute of this territory, is limited to be commenced within a different time, nor shall this act be construed to repeal any existing statute of the territory which provides a limitation of any action; but in such cases the limitation shall be as provided by existing statutes.
>
> *Section 2929, Compiled Laws of 1897.*

The argument goes further that there was at that time already in existence a ten year statute of limitations as to the recovery of real estate which had been originally enacted in 1858, and therefore the provisions contained in section 2925 could not apply to this already existing limitation.

There are two answers to this argument. The first is that the language of section 2925 is unlimited and by its terms is applicable to any sort of an action, while by the exercise of ordinary common sense in the consideration of section 2929, it is apparent that its intention merely was that the new act of 1880 should not affect limitations already provided by statute as to actions not covered by the new law. The other is that by the action of the legislature in 1884, the provisions of the act of 1880, and of the earlier statute concerning the limitation of actions for the recovery of real property, have been, in effect, re-enacted as one statute, so that the provisions of sections 2925 of the compilation of 1897, extend to actions of ejectment as well as to the other actions enumerated in the chapter.

On April 3, 1884, the legislature provided for an authoritative, legalized compilation of the laws of the territory, of which act section 4 reads as follows:

> When said laws shall have been printed, and are ready for distribution, the governor shall issue his proclamation announcing such fact, and thirty days after the date of such proclamation said compilation shall go into effect, and thereafter the laws so compiled shall be received by all the courts and officers of this territory, and shall in all respects be as valid and binding as original enrolled acts approved and filed in the office of the secretary of the Territory as now provided by law.

By reference to Chapter 2 of Title 33 of the compilation thus provided for, beginning at section 1860 and ending with section 1881, it will be found that all of the act of 1880 is included, together with the two sections as to limitation of actions for the recovery of real

estate. There can be no doubt of the legislative intent that the general provisions in the act of 1880, like those contained in section 2925 of the Compiled Laws of 1897, should apply as well to actions concerning real estate, as to any other actions. Subsequent legislatures up to 1897, by repeated acts of legislation, treated the Compiled Laws of 1884 as the laws of the Territory, thus recognizing the official and binding character of that compilation. It may be suggested that there was no necessity, if our view is correct, of including the section which declared that "None of the provisions of this act shall apply to any action or suit which by any particular statute of this territory is limited to be commenced within a different time." But there was such necessity when one takes into consideration the fact that there were other periods of limitation not included in this chapter of the Compiled Laws, such as the one year limitation as to actions of replevin, the limitation as to the time within which actions may be revived after the death of a party, the limitation of two years within which actions must be brought against the estates of deceased persons, the limitation of one year for the beginning of actions to recover money lost at gaming, the limitation as to actions for wrongfully causing death of a person, and perhaps, others which were at that time in force.

NINTH.

Depositions taken for use in the court of private land claims were improperly admitted in evidence, if the court were correct in sustaining demurrer to replication.

In the discussion of the eighth point of this brief,

it has been shown that the court sustained a demurrer to one of plaintiff's replications, which set up the former suit in the court of private land claims and its dismissal for causes other than negligence in its prosecution, and the subsequent beginning of the present suit within less than six months. This demurrer could have been sustained only upon the ground that the former action was not between the same parties and for the same purpose.

The depositions which were admitted in evidence had been taken and used in the former suit in the court of private land claims. They will be found in the printed record, on pages ~~173~~ 144 to ~~184~~ 154. Objections to their admission will be found on page ~~174~~ 143. The only possible ground upon which the depositions could be admitted, was that the former suit was one between the same parties and for the same purpose.

If the court was correct in its ruling on the demurrer, it could not have been correct in admitting the depositions.

A further, and more serious, objection to the admission of the depositions was made that it was not shown that they were properly admissible even in the land court, and it was admitted by counsel that the witnesses were in attendance on the court at the time that their depositions were read. These depositions were taken *de bene esse, and* were not admissible if the witnesses themselves could be produced and examined orally.

The rule of the court of private land claims on this subject was as follows:

> In all cases witnesses for either party shall be

examined in open court upon the trial of the cause, unless they are sick, infirm, or otherwise unable to attend, and in that event either party desiring the testimony of such witness or witnesses shall make application to the court or any judge thereof to take the deposition of such witness or witnesses, and if it appears to the satisfaction of the court or judge that such witness or witnesses ought not or cannot be compelled to appear in court and testify, the court or judge shall make an order allowing the deposition of such witness or witnesses to be taken.

TENTH.

The deed to plaintiff is valid.

This point is anticipatory, and is made because, in the supreme court of New Mexico, counsel for defendant asked for the application,—to us a most surprising position,—of the doctrine of the invalidity of a deed made while the grantor is out of possession and the land is in the possession of another,—a doctrine which, in view of decisions of this court, must be considered as obsolete in that jurisdiction. There are states where it is retained, but that fact cannot affect the courts of New Mexico.

It is so clearly discountenanced by this court, that there can be no doubt on the subject. The following quotation plainly shows this:

> In this country, where lands are an article of commerce, passing from one to another with such rapidity, the ancient doctrine of maintenance, which makes void a conveyance for lands held adversely, is in many states entirely rejected. In some it has been treated as obsolete by the courts; in others it has been abolished by statute;

while with some it appears to have found more favor.

> The ancient policy, which prohibited the sale of pretended titles, and held the conveyance to a third person of lands held adversely at the time to be an act of maintenance, was founded upon a state of society which does not exist in this country. The repeated statutes which were passed in the reigns of Edw. I and Edw. III against champerty and maintenance, arose from the embarrassments which attended the administration of justice in those turbulent times, from the dangerous influence and oppression of men in power.
>
> *Roberts v. Cooper*, 20 *How.*, 483.

In another, and much more recent case, we find the following:

> We are then brought to the consideration of the principal question in the case, whether the deeds to the plaintiffs were void for champerty.
>
> In many parts of the United States, and probably in Maryland and consequently in the District of Columbia, the ancient English statutes of champerty and maintenance have either never been adopted, or have become obsolete, so far as they prohibited all conveyances of lands held adversely. 4 *Kent Com.*, 447; *Roberts v. Cooper*, 20 *How.*, 467; *Schaferman v. O'Brien*, 28 *Maryland*, 565; *Matthews v. Herner*, 2 *App. D. C.*, 349.
>
> *Peck v. Heurich*, 167 *U. S.*, 629-30.

The last quotation naturally leads to the examination of the Maryland case cited, to see what the court means by the phrase "and probably in Maryland," and we find the following:

> It has also been insisted that the complainant having purchased the judgment against Leiman, subsequent to the deed, has no standing in court

—that such a purchase savors of champerty—is in violation of the statute of Henry VIII, ch. 9, recognized in Kilty's Report, as in force in this state. This statute prohibits under penalties, the buying or selling of any pretended right to land, unless the vendor is in actual possession of the same, or of the reversion or remainder. "The ancient policy which prohibited the sale of pretended titles as an act of maintenance, was founded upon a state of society which does not exist in this country." 4 Kent, 256.

The statute of Henry VIII, ch. 9, is not rigidly enforced in this country. *Sedgwick vs. Stanton*, 14 *N. Y. Rep.*, 289. "It will have been perceived that the subject of the assignment of rights of action, as tending to the common law offenses of champerty and maintenance, is here left in a state of considerable uncertainty." The subject was examined in a late case, (*Danforth vs. Streeter*, 28 *Vermont*, 490,) and the following conclusion reached: "That the bona fide purchaser of a bond or other chose in action, which is represented to be due, and which the purchaser believes to be due, may sue upon the same and not incur censure from the law; and that all contracts founded upon any such consideration are valid. The same is true of any aid one may render another in a suit, by way of money or advice or other lawful assistance, if done under a bona fide belief in the justice of the case. It was upon these grounds that we venture to suggest that the common law notion of maintenance, as applicable to the assignments of rights of action, had become practically obsolete." Story's Eq. Jur., sec. 1057. "Maintenance now means, where a man, improperly and for the purpose of stirring up litigation and strife, encourages others, either to bring actions or to make defences, which they have no right to make." *Findon vs. Parker*, 11 *Mees. & Welsby*, 679, 682, referred to in 4 Kent, 531.

> We are not aware of any case in the judicial history of this state, where the provisions of the statute of Henry VIII, have been enforced—without meaning to assert that there might not be such exceptional conduct savoring of champerty and maintenance, as to be punishable, yet there can be no doubt that this statute is, in a great measure, now obsolete.
>
> *Schaferman v. O'Brien*, 28 *Md.*, 573-4.

The same rule is followed in a very recent case.

> *Chesapeake B. R. Co. v. W. P. & C. R. Co.*, 199 *U. S.*, 252.

In conclusion, we call attention to the statute of New Mexico as to the jurisdiction of the supreme court of the territory in cases brought before it for review. This will be found in section 3141 of the Compiled Laws of 1897, and is as follows:

"The supreme court in appeals or writs of error shall examine the record, and on the facts thereon contained alone shall award a new trial, reverse or affirm the judgment of the district court, or give such other judgment as to them shall seem agreeable to law."

This section was repealed by section 60 of chapter 57 of the laws of 1907, but was reenacted in section 38 of the same chapter without any change except to correct the obvious error of the word "thereon," instead of "therein," and with the addition of another clause, not here material, as to the reviewing of cases tried without a jury.

It will be seen that the supreme court is given discretion to enter a final judgment without being limited to awarding a new trial, reversing or affirming the judgment of the court below. If we are correct in the

positions taken in this brief, it was clearly the duty of that court to enter a judgment in favor of plaintiff.

It is therefore respectfully submitted that, not only should the judgment of the supreme court of New Mexico be vacated and set aside, but that, in addition, the cause should be remanded to that court, with directions to enter a final judgment in favor of the plaintiff in error, as ought to have been done when the case was heard and decided in that court.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 73.

MARIANO F. SENA,
Plaintiff in Error,

vs.

AMERICAN TURQUOISE COMPANY, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

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PRESS A. S. FLEMING PRINTING CO., ST. LOUIS

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STATEMENT.

This is an action of ejectment brought by plaintiff in error to recover the possession of certain lands in Santa Fe County, New Mexico. Plaintiff claims title under a Spanish grant alleged to have been made in the year 1728. The land in question contains valuable deposits of turquoise, and defendant is in possession claiming under several mining locations made in the years 1885 to 1892 by its predecessors in interest, who believed the land to be public domain of the United

States and entered upon it under the general mining laws.

The grant relied upon by plaintiff in error is known as the Jose de Leyba Grant, and was before this court, on appeal from the Court of Private Land Claims, in the case of *Sena v. United States*, 189 U. S. 242.

The general issue plead by defendant in error raises the question of the validity of the Jose de Leyba Grant and the sufficiency of its boundary calls, and as additional defenses defendant in error has plead and relies upon adverse possession for the statutory period and the laches of plaintiff in error.

The Supreme Court of New Mexico, in affirming the decision of the District Court of San Miguel County in favor of defendant in error (R., p. 179), did not pass upon either of these affirmative defenses, but based its decision solely on the finding that the Jose de Leyba Grant was an imperfect grant, and for that reason not sufficient title to allow plaintiff in error to recover.

BRIEF.

I.

The Findings of Fact by the District Court of San Miguel County Will Not Be Reviewed in This Court.

After the testimony had all been introduced in the District Court and the case concluded, plaintiff and defendant each moved the trial court for an instructed verdict (R., p. 171). As both parties to the action at the close of the case moved the trial court for an instructed verdict, and neither submitted nor requested any special instructions to the jury, the findings of fact by the trial court, under such circumstances, will not be reviewed by this court. Therefore, this court, under the rule, "is limited in reviewing its action, to the consideration of the correctness of its finding on the law and will affirm, if there be any evidence in support thereof."

Buetell v. *Magone,* 157 U. S. 154.

Empire State Cattle Co. v. *A., T. & S. F. Ry. Co.,* 210 U. S. 1.

On the trial of this case there was practically no dispute as to facts. On the issues of the character of the paper title of plaintiff, and the adverse possession of defendant, the record shows no conflict. There was some conflict in the proofs as to the definiteness of the boundary calls of the Jose de Leyba Grant, and it is chiefly upon this issue that the rule above expressed becomes of importance. Attention will be called to it in the discussion of that subject.

II.

The Jose de Leyba Grant, Not Being a Perfect Grant and Having Received no Confirmation by the United States, Does Not Constitute Title on Which a Judgment for Plaintiff Could Have Been Based.

The title of plaintiff in error to the land in controversy rests entirely upon the title to the Jose de Leyba Grant. That grant can avail him nothing unless its title was perfect under the laws of Spain and Mexico. If it was an imperfect grant, then it is insufficient as a source of title, for it has not been confirmed by the Congress of the United States and was refused confirmation by the Court of Private Land Claims (R., p. 141), and the claim of its validity is therefore barred by Section 12 of the Act of March 3, 1891, creating the Court of Private Land Claims, providing that such claims if not prosecuted before that court within two years from the taking effect of that act should "be deemed and taken, in all courts and elsewhere, to be abandoned and shall be forever barred."

There is no controversy upon this feature of the case, the argument of plaintiff in error (brief, pp. 18-25) being entirely to the effect that the grant was in fact perfect.

Upon this branch of the case the question therefore is as to the character of the Jose de Leyba Grant, whether it was perfect or imperfect. The standard by which this question is to be determined is correctly stated in the brief of plaintiff in error (p. 19), as follows:

> "The distinction between perfect and imperfect titles, under the government of Coahuila and Texas, has been often discussed in this court, and resulted in the acknowledgment of the distinction,

and resting it on the following basis, that is to say: If the grant were to receive no further act to constitue it an absolute title to the land from the legal authorities, taking effect *in presenti*, it was a perfect title, requiring no further action of the political authority to its perfection. But if something remained to be done by the government or its officers, such title or right was imperfect; and until it received the sanction of the political authority it could not claim juridical cognizance. *Hancock* v. *McKinney*, 7 Tex. 384."

In *Territory* v. *Delinquent Taxpayers*, 12 N. M. 169, a perfect grant is defined as one "where the granting power has, on the one hand, done all that the law required to make a complete title, and the grantee has also done all that the law requires of him to receive and enjoy it in fee."

The petition and grant appear on pages 31 and 32 of the Transcript. The grant was made in the year 1728 by Juan Domingo de Bustamente, then Governor and Captain General of New Mexico. He ordered the chief alcalde to give juridical possession, which was done. No further steps were taken and the grant was never approved, confirmed or acted upon by anyone other than the Governor.

In the year 1728, when this grant was made, the King of Spain exercised his power in Mexico through a Viceroy, and Royal Audiencias of which the Viceroy was the chief officer. The province of New Mexico was then under the control of the audiencia at the City of Mexico (Hall, Mexican Law, Paragraph 12). The whole of the Mexican territory was divided into various kingdoms and provinces, each of which had its governor exercising executive functions within its limits, subject to the control of the Viceroy and proper audiencia (Hall, par. 13). The Viceroy was

looked upon as the "Alter ego" of the King; the governors were officers of limited jurisdiction and wholly subordinate to him. (Reynolds, Spanish and Mexican Land Laws, p. 26.)

In the early years of Spanish rule, grants of land in Mexico were made by the King himself. In 1591 this power was by royal cedula conferred on the Viceroy. (Hall, Sec. 21.) Subsequently the same power was exercised by certain agents of the audiencias apparently subject to the approval of the Viceroys. (Hall, Sec. 25.)

In 1617, by a royal cedula the King provided that all grants of land should be confirmed by him before definite title passed. The effect of this was to take from the Viceroy the absolute power of disposition or approval, and to vest that power once more in the King. (Hall, Sec. 26, Reynolds, p. 26.)

So far as counsel for defendant in error have been able to discover, the above are the only important laws relative to the disposition of Crown lands in force in New Spain prior to 1735. No others worthy of mention are cited by the various authorities on the subject. It will be noticed that none of these specifically give authority to governors of provinces to dispose of the royal domain, the presumption being that in so doing they acted as designated agents of the audiencias, and the Court will notice the care with which the King provided for a ratification and approval of the acts of subordinate officers, either by himself or his Viceroy. It is stated by both Hall and Reynolds, though no authority is cited for the statement, that at some time subsequent to 1617 the necessity for confirmation by the King personally was done away with. If this be so, it is fair to presume that the power of approval was once more vested in the Viceroy.

In 1735, seven years after the date of the Leyba Grant, the King by royal cedula again required that grants of land should be submitted to him for confirmation before title should pass to the grantees (Hall, par. 27; Reynolds, p. 26), but this cedula was in turn superseded by that of October 15, 1754, to which we desire especially to call the Court's attention. This cedula is set out in full in White's Recopilacion, Vol. 2, p. 62, and Reynold's Spanish and Mexican Land Laws, p. 50. The King, after reciting the inconvenience and unnecessary expense caused by his cedula of 1735, and stating that many of his subjects were occupying portions of his public domain without good title, orders that all persons in possession of such lands should submit their titles to his officers for their inspection and decision regarding their validity. This provision is contained in Section 3 of the cedula, which is translated by White as follows:

> "The present regulations, and the appointment which shall be issued in the form prescribed in the first section, being received by the principal sub-delegate, they shall furnish, on their part, general orders to the justices of the capitals and chief places of their respective districts, commanding them to be published therein, in the manner usual with other general orders issued by viceroys, presidents and audiencias, relating to my service, so that every and all persons who shall have possessed royal lands, whether settled, cultivated, tilled, or not, from the year 1700 till the day of the publication of said order, may prove, before the sub-delegate, by themselves, their correspondents, or attorneys, the titles and patents in virtue of which they hold their land. For this exhibition an adequate time shall be fixed, proportioned to the distances; and notice shall be given, that they shall be deprived of, and ejected from, such lands, and grants of them made to other persons,

of they fail to exhibit their warrants within the limited time, without just and proper cause."

Section 5 of that cedula reads as follows, copying from White:

"The possessors of lands sold, or compromised for, by the respective sub-delegates, from the said year 1700 to the present time, shall not be molested, disturbed or informed against, now, nor at any time, if it shall appear that they have been confirmed by my royal person, or by the viceroys and presidents of the respective districts, while in office; but those who shall have held their lands without this necessary requisite, shall apply for their confirmation to the audiencias of their district, and to the other officers, on whom this power is conferred by the present regulation. These authorities having examined the proceedings of the sub-delegates, in ascertaining the quantity and the value of the lands in question, and the patent that may have been issued for them, shall determine whether sale or composition was made without fraud or collusion, and at reasonable prices. This shall be done with the judgment and advice of the fiscals; after considering every circumstance and the price of the sale or composition, and the respective dues of medianata—(first fruits of the half year)—appearing to have been paid into the royal treasury, and the king's money being again paid in the amount that may seem proper, the confirmation of the patents of the possessors of these lands shall be given in my royal name, by which their property and claim in the said lands shall be rendered legal, as well as in the waters and uncultivated parts, and they and their successors, general and particular, shall not be molested therein."

It is thus apparent that the King of Spain did not recognize the titles of grant holders whose claims had not been approved by himself or his Viceroy or Au-

diencia. He speaks of such persons as holding their titles "without this necessary requisite." He did not consider their titles perfect, and required them to be made perfect by obtaining such approval. The Jose de Leyba Grant admittedly is within the class affected by this cedula. In the eyes of the King it was imperfect when made. The claimants did not take the necessary steps to perfect it in accordance with this cedula. Under Spanish law, as set out in Section 3 above, they were liable to be "deprived of and ejected from such lands, and grants of them made to other persons" at any time. Certainly "something remained to be done" both by Jose de Leyba and by the officers of the Spanish crown before final title passed to him.

In the case of *Menard's Heirs* v. *Massey*, 8 How 293, the Supreme Court of the United States, speaking of a grant made by the Lieutenant Governor of a Spanish province which had not been confirmed by the Intendant, to whom the confirmatory power was entrusted by an Ordinance of the King of Spain, in 1786, says:

> "The necessity of a further title than a mere loose order of survey, given by commandants of posts and lieutenant-governors, and placed in the hands of the interested party, is too manifest for comment. Petitions were written by the party asking the land, or some one for him; the governor consented, usually by indorsement on the petition, and ordered that the petitioner should have the land, and directed that it should be surveyed; the paper was handed to the petitioner, who might deliver it to the surveyor, or omit it; if he presented it, and the land was laid off, then it was the surveyor's duty to record both the concession and plat, together with the process-verbal. But this did not make the party owner; without the further act of the king's deputy—the Intendant-General—the title still continued in the crown."

The foregoing is the precise ground upon which the Court of Private Land Claims rejected the Leyba Grant. In speaking of that Grant, the Court says:

> "Upon consideration of the state of facts presented, the Court has reached a conclusion which may be briefly stated. The first question arising is, what is the character of this grant, whether perfect or imperfect? It is claimed by petitioner to be a perfect grant, and therefore could be brought into this Court at any time, or not at all, under the statute. Inasmuch as the grant was made at the date mentioned, 1728, it falls under the requirements of the Royal Ordinance of 1754, which provides that all grants made subsequent to 1700 unless already confirmed by royal order of the King, or his viceroys, or Presidents of the Audiencias of the several districts embracing the lands granted, should apply for such confirmation as a prerequisite to validity. There is no evidence in this case, either by the documents presented or otherwise that these requirements of the ordinance of 1754 were ever complied with. Nor is there in the nature of the case or upon any of the facts in evidence any grounds that will justify a presumption of such compliance with the requirement for confirmation. It therefore follows that this grant must be held to be not a perfect but an imperfect grant."

The above is the opinion of the court specially created to deal with Spanish and Mexican land grants, and particularly familiar with the laws of Spain and Mexico governing their validity.

The Supreme Court of New Mexico, which based its decision upon the imperfect character of the grant used the following language:

> "In 1754 the government of Spain was that of an absolute monarchy, and it is not for us to question the right of the King to compel holders of titles theretofore given to apply for confirmation.

> It was therefore necessary for the then claimant of the Jose de Leyba Grant to obtain such confirmation. Without it his grant became void and he could at any time be ejected by the sovereign, or any other person to whom the same land was equally granted. There is no documentary proof before us of any such application, or of any confirmatory action by the Spanish Governor or other officer. It is not unlikely that the certificate of confirmation would be endorsed on, or attached to the original grant papers, but no such certificate appears though the original is in evidence. It being incumbent upon plaintiff to show that his grant was perfect, its confirmation became a necessary element in his proof. No such evidence having been introduced, the grant must necessarily be held imperfect, unless such confirmation is to be presumed from the surrounding facts and circumstances."

We cannot agree with the statement on page 20 of the brief of defendant in error that the opinion of the Court of Private Land Claims on this subject was "practically repudiated by this court" on appeal in *Sena* v. *U. S.*, 189 U. S. 242. It is true that the particular point was not discussed in the opinion proper, but such discussion was then unnecessary inasmuch as the court rejected the grant on other grounds.

Defendant in error does not dispute the fact that his paper title is defective owing to the lack of confirmation under the cedula of 1754. Indeed, he practically admits that such confirmation was essential (brief, pp. 19, 20). His argument is that although there is no record proof of confirmation the evidence as to possession of the grant is such that confirmation will be presumed.

It is true that actual possession of land continued for a sufficient length of time, may, under proper cir-

cumstances, give rise to a presumption of title and of the existence of the links necessary to constitute the chain of title. That being the law, the question is as to whether or not the facts in the present case are sufficient to raise such a presumption.

This presumption arises only from actual possession. It does not arise from a claim of title unaccompanied by actual possession. And while possession may be presumed to be in him who holds the legal title, there is no such presumption as to one claiming a title not in fact valid. To say that a claim of title implies possession, and that perfect title is presumed from such possession is to reason in a circle. The question on this branch of the present case, therefore, is as to the proof of actual possession of plaintiff in error. And, before inquiring as to his possession, it is well to keep in mind the fact that for more than ten years prior to the commencement of this action the land has been in the actual adverse possession of defendant in error, a fact which will be further discussed in connection with the defense of the statute of limitations, so that as to such period there is no possibility of any presumption in aid of plaintiff in error.

Excepting the certificate of juridical possession of the grant (R., p. 32), and without discussing the question whether the acts mentioned in this certificate show an actual or only a technical possession, the record in this case discloses very few circumstances from which to draw a conclusion that the claimants of the land in question ever had it in actual possession. The evidence relied upon by plaintiff in error is as follows:

1st. The will of Zimeon de Leyba (R., p. 47).

This will contains a statement that the testator made it "at his ranch" at this place of the "Coyote Springs," and a statement that there was constructed

on the ranch a small house and some other improvements. This house was not his residence, as appears from the third item of the will. While this will shows a claim of ownership, it falls far short of proving any actual possession of the grant, and even if it can be said to prove possession of the small house, it certainly does not prove actual possession of the land involved in this case.

2d. The deed of Salvador Antonio Leyba to Juan Angel Leyba (R., p. 48).

It appears from this deed that both parties to it were residents of the City of Santa Fe. The deed contains no statement of any kind as to the possession of the land conveyed, nor can actual possession be presumed from the mere execution of the instrument.

3d. The statement that Juan Angel Leyba was killed on the grant by the Indians (R., p. 52).

It is difficult to understand how actual possession can be deduced from this fact. Presence does not imply possession. The language of this court in *Sena* v. *U. S.*, that "it seems to have been uncertain whether he (Juan Angel) was in actual possession of the tract" at least shows that this court was unwilling to draw any such conclusion.

4th. The pledge of Josefa Leyba (R., p. 74).

This instrument, while it may show a claim of ownership, certainly contains nothing on which to base a conclusion of possession.

5th. The testimony of Felipe Pino (R., pp. 166-168), is referred to in the brief of plaintiff in error (p. 25) as showing acts of dominion, ownership and use of the land. It amounted simply to statements by the witness that certain of the Leyba's told him that at one time some cattle belonging to them pastured on the grant. Most of the testimony was excluded by

the trial court as being hearsay. The fact that cattle belonging to the Leybas, but in the custody and control of a third party who had them on shares, pastured on the grant, certainly does not show possession in the Leybas.

The Supreme Court of New Mexico (R., p. 182), in deciding the present case, made the following statement as to the facts of possession:

> "In this case the plaintiff was not in possession of any portion of the grant at the time of the commencement of the present proceeding, and no one of his predecessors in interest had been in possession since the American occupation. The various documents bearing date prior to 1840 show a claim of ownership rather than actual use, and the title claimed may or may not have been accompanied by possession."

And the Court of Private Land Claims, when the Leyba Grant was before it for decision, in passing upon the proof of possession, said:

> "The evidence as to settlement and occupation of the tract purporting to have been granted, continuity of possession, cultivation, residence, improvement, claim of ownership, notoriety of the grant and knowledge of its existence in the community or by the oldest inhabitants now living, is so vague, contradictory and uncertain as to be almost wholly wanting."

Plaintiff in error now claims that the proof in this respect is stronger than that before the Court of Private Land Claims. We think the record demonstrates that the evidence on this point in the Land Court and upon the trial of this case was substantially the same.

Plaintiff in error cites *U. S.* v. *Chavez*, 175 U. S. 520, and *U. S.* v. *Pendell*, 185 U. S. 196, as authority for his argument that a presumption of the confirmation

of the Leyba Grant arises from possession. The facts in those cases were widely different from those in the case at bar, and in each of them there was a conclusive finding of actual possession.

In *U. S.* v. *Chavez*, 175 U. S. 509, this court stated the facts as to the possession of the grant there in question as follows:

> "Private ownership of the property with possession is claimed for over one hundred and thirty years before the cession of the territory to the United States. A continuous possession is shown from some time prior to 1785, inferentially from 1716. Mexico respected that ownership and possession for the full period of its dominion over New Mexico. Spain respected them for over one hundred years, and at the time of the cession of the sovereignty over the territory to the United States no one questioned them."
>
> (pp. 519, 520.)
>
> "Besides, it is admitted that the Pueblo of Isleta has had open and notorious possession as far back as the memory of the oldest inhabitant can extend, and that it was claimed under the heirs of Clemente Gutierrez, and evidenced by documents which came from the custody and control of the officers who have had them during like memory. Back to Clemente Gutierrez, therefore, a continuous possession is established by admission and by testimony not contradicted. Back beyond the period of living memory and beyond that period the title needs no inquiry for its validity and repose."
>
> (pp. 523, 524.)

In *U. S.* v. *Pendell*, 185 U. S. 196, the trial court stated the facts of possession as follows:

> "Our view of the evidence is that this tract of land was in the possession of Francisco Garcia exclusively during his lifetime from the beginning of this century, and that upon his death it passed

> to the hands of his children and remained in their possession until long after the transfer of sovereignty of the country to the United States, and is now in the possession of their grantees and their families. There have been very few claims based upon long possession more satisfactorily made out, in our minds, than is made out by the evidence in this case. These being the facts as we find them, we feel absolutely bound by the doctrine established in the case of *United States* v. *Chavez*, 175 U. S. 509.

And the same court made the following finding of fact:

> "3. That the land included in the said out boundaries continued in the possession of the said grantee, his heirs, legal representatives, and assigns, from the time of the making thereof, prior to the year 1790, as aforesaid, down to the present time, and that the petitioners herein have succeeded in part to the rights of the said original grantee." (p. 192.)

And because of the foregoing findings, this court stated:

> "In this case we therefore take the fact to be that there was a possession under a grant of some kind, starting before 1790, and continuing, uninterrupted, until the filing of the petition." (p. 198.)

If the statement by the Court, in *United States* v. *Chavez*, *supra*, to the effect that the government of Spain respected the ownership and possession of the grant for over one hundred years, is of importance, it is to be noted that the opposite is the fact in this case, for the Cerillos Grant, made in 1788 by the Spanish authorities (R., p. 157), includes land within the claimed boundaries of the Leyba Grant.

It will therefore be seen that in each of the foregoing cases there was proof of an actual and ancient possession continuing to the time of trial, and it was upon that state of the facts this court presumed the validity of the grant. In the present case there are no such facts upon which the presumption can be based. Even giving the broadest effect to the claim of plaintiff in error, there is no evidence whatever of any possession or claim of title from the year 1855, the date of the pledge above mentioned, to the date of the commencement of this action, a period of nearly fifty years.

There being no record proof of confirmation of the Leyba Grant under the Cedula of 1754, and no proof of possession sufficient to raise a presumption of validity, the grant must be held imperfect and the title of plaintiff in error to the land in question fails. On this ground alone the judgment of the lower court should be sustained. But if this court takes a contrary view to that above expressed, then its action should still be the same because of the indefiniteness of the boundaries of the grant and the affirmative defenses of defendant in error.

III.

The Question of Boundaries.

The question of the boundaries of the Jose de Leyba Grant is important in two aspects of the present case: In the first place, it is essential to the validity of the grant as a perfect title that the boundaries be definite and susceptible of exact location on the ground. In the second place, this being an ejectment proceeding for the recovery of mining claims of a total area of about fifty acres, plaintiff's claim to which rests

entirely upon his claim to the grant, it is incumbent upon him to prove that this acreage is within the boundaries of a defined grant. So that it is not unjust to say that in this case, where plaintiff seeks to use his grant as a weapon of offense with which to oust defendant from possession the proof of boundaries should be even more definite than in *Sena v. U. S.*, *supra*, which was under the Private Land Claims Act where the only question was as to whether or not the grant was entitled to confirmation through the Court of Private Land Claims.

At least two of the boundary calls "the lands of Juan Garcia de Las Rivas" on the west and "an arroyo called Cuesta del Oregano" on the south, are extremely indefinite. The mines in question are located in Section 21, in Township 15 North of Range 8 East, and the map opposite page 50 of the Record shows that they are therefore not more than a mile east of the western grant boundary as claimed, and not more than about two miles north of the southern boundary as claimed. These two boundaries, therefore, become of great importance in this case.

Plaintiff in error now claims to have shown that the eastern boundary of the lands of Juan Garcia de las Rivas, which forms the western boundary of the Leyba Grant, is the Penasco Blanco de las Golondrinas.

It is fair to assume that the map opposite page 60 of the Record, locates the Leyba Grant as nearly as possible in accordance with the boundary calls. A glance at this map shows that the Leyba Grant as claimed by plaintiff does not even touch the Penasco Blanco on the west. The Penasco is northwest of and outside of the grant lines as there drawn. According to this map the west line instead of being the "land of Juan Garcia de las Rivas" as called for by the grant

papers, is the Cerillos tract and public lands. If it touches at all on the Garcia lands it is only for a very short distance.

The location of the south boundary, "an arroyo called cuesta del oregano," is also doubtful. Many of the witnesses, all of whom profess to be familiar with the country, testify that they never heard of such an arroyo in that vicinity. While others do attempt to locate it, it is apparent that a surveyor could ascertain its position only by taking evidence and determining disputed questions of fact.

A grant to be perfect must have definite boundaries. No other authority upon that point is necessary than the case of *Carpentier* v. *Montgomery*, 13 Wall 480, quoted from in plaintiff's brief. The Supreme Court of the United States said in that case:

> "Leaving out the proceedings of 1844, which are admitted to be imperfect, no human being can tell, from the language of the various documents, what was the eastern boundary of the rancho. It certainly would seem not to embrace the eastern slope of the hills, as is now claimed; but what it did embrace, or where it did run, is not ascertainable from any of the documents which have been adduced; and no parol testimony can aid this defect as regards the question now under consideration. Parol testimony was very properly adduced before the commissioners for the purpose of showing where equity required that the line should be run, in order to separate the rancho from the public domain. But it cannot make that title perfect which was not perfect before."

A reading of the grant papers set out in that case will show that they set out boundaries at least as definite as those of the Leyba grant. The limits are designated by natural objects, and in addition "firm

landmarks" were fixed on the boundaries (pp. 482, 483).

A reading of the opinion of this Court in the case of *Sena* v. *U. S.*, 189 U. S. 237, upon the subject of the boundaries of this grant is instructive. There this court practically says the boundaries cannot be ascertained. The proof upon that subject in the present case is substantially the same as that then before this court, except that plaintiff has now shown the east boundary of the Garcia de las Rivas land, and consequently the west boundary of the Leyba land, to be the Penasco Blanco as above referred to. Certainly in this case, where the boundaries must be proved not only for the purpose of showing that the grant was described with sufficient definiteness to allow its segregation from the lands of the United States, but also to show that it includes the mines sued for in the present case, a still higher degree of proof should be required.

The district court of San Miguel County said on this subject, in instructing the jury:

> "From the evidence introduced here, it seems to me it cannot be doubted that it is a fact, that these two—the western and southern boundaries are very imperfect. You claim that it is bounded by a straight line from the land of Juan Garcia de las Rivas. That only covers a small part of the western boundary as claimed. The Cerillos Grant comes over it. Which would be the better grant I don't know. It is certainly a grant, which certainly could not be decided without evidence and without a hearing. The line on the south is also I think very doubtful—as to where that line is—that is the arroyo Cuesta del Oregano—several witnesses testified that there was such a Cuesta of the Canada, and it was at such a place while others testified there is no such place at all. Four or five witnesses—I don't recall how many—testified

there is no such place as the Canada Oregano, and that they never heard of it. I don't think it could be ascertained without taking a great deal of testimony.

"I am of the opinion that this is not a perfect grant within the contemplation of the law, and not being a perfect grant that the plaintiff, Mariano F. Sena, has no title to it."

This is a specific finding by the trial court to which the issues were submitted by both parties, and under the rule announced by this court, in *Buetell* v. *Magone*, 157 U. S. 154, it must be affirmed "if there be any evidence in support thereof."

IV.

Defendant in Error Has Had Such Adverse Possession of the Premises That the Statute of Limitations Has Run in Its Favor.

The only rights claimed by defendant in error in this case are such as are created by the locations of the various mining claims, and the possession held thereunder. Of course, if the Jose de Leyba Grant is held to be imperfect, and we believe it should be, then the right of possession of defendant in error under these mining claims is absolute. But even if the Leyba Grant is a perfect one, giving plaintiff in error a complete paper title, to the grant as a whole, nevertheless the right of defendant in error to the property here in question must be sustained on account of the adverse possession.

On his branch of the case there is no dispute on the facts. The New Mexico statute of limitations as to real estate requires ten years adverse possession. This proceeding was commenced May 14th, 1903. The min-

ing claims were located as follows:

The Castilian Quartz Mining Claim (now the Old Castilian), in 1885 (R., p. 83).

The Muniz, in 1890 (R., p. 83).

The Gem, in 1891 (R., p. 84).

The Morning Star, in 1891 (R., p. 83).

The Sky Blue Turquoise, in 1892 (R., p. 84).

All of these claims were located under the mining laws as containing valuable deposits of turquoise, possession was taken and the annual labor done as required by law (R., pp. 88-94).

Prior to 1892, when the present superintendent, McNulty, took possession, the mines then located were held and worked by the claimants, and since that time defendant in error, through its superintendent, has had the property in actual possession, working and developing the same (R., pp. 99, 101, 102, 105-108, 112, 113, 119, 120, 129, 130, 134).

The necessary monuments were erected and notices posted, the monuments being still in existence. (R., p. 134.)

A house was built on the Muniz Mine in 1890. (R., pp. 129, 130.)

The defendant has been continuously developing the property and has expended on the Muniz Mine alone over $25,000.00. (R., p. 109.)

No question is raised as to the chain of title from the original locators to defendant in error, and it is in fact complete. (R., p. 84-88.)

It will thus be seen that these mines have been in the actual exclusive physical possession of their claimants for more than the statutory period. There is not a word of evidence that this possession has ever been interefered with or that any hostile claim was ever asserted by anyone until the proceeding in the

Court of Private Land Claims, instituted by plaintiff in error. It is hardly consistent for counsel for defendant to assert that the facts as to the early possession of the Leyba Grant, deduced from mere claims of ownership, are sufficient to raise a presumption of title, and at the same time to argue that the actual possession shown in the mine claimants is insufficient to constitute adverse possession under the statute. As to the argument that no taxes were paid on the land it would seem sufficient to reply that none were assessed and that the claims were exempt from taxation under territorial law. The payment of taxes was, therefore, an impossibility.

The fact that the mine claimants held under mining locations, believing the land to be a portion of the public domain of the United States, did not prevent the running of the statute of limitations in their favor.

The principal contention of plaintiff in error on the question of the statute of limitations is that to cause the running of the statute the possession must be adverse to all the world, and that the possession in the present case being in subservience to that of the United States, the statute cannot be availed of as a defense.

Although in the case of mining locations on the public domain the ultimate fee is vested in the United States, yet such a mining claim is always treated as being an estate in fee and as a distinct vested right of property founded upon possession and appropriation. The locators are treated as against everyone but the United States as the owners of the land and mines therein. The legal title is in the United States but the equitable title is in the claimant, and if he has properly complied with the law, the United States

holds the legal title only as trustee for him. That this is the law is laid down in many decisions.

Forbes v. *Gracey*, 94 U. S. 766.
Noyes v. *Mantle*, 152 U. S. 348.
Merritt v. Judd, 14 Cal. 60.
Hughes v. *Derlin*, 23 Cal. 502.
Aspen, etc., Co. v. *Rucker, et al.*, 28 Fed. 220.
McFeters v. *Pierson*, 24 Pac. 1076.

It will thus be seen that the locator of a mine under the laws of the Government does acquire property in and a title to his land. If his location is properly made and the laws governing it obeyed, he has a right even superior to the United States. The ultimate title may still be in the Government, but it is merely the naked legal title held in trust for the locator and obtainable by him whenever he pleases. He does not claim a title subordinate to that of the United States, but that he is acquiring the title of the United States in accordance with its laws. The government cannot deprive him of his mine so long as he conforms to these laws. It will thus be seen that the objection of plaintiff that defendant has not claimed adversely to the United States is technical in the extreme. It has claimed and is claiming adversely to plaintiff. But let us see if the contention is even technically correct according to the authorities that have already definitely passed upon the question.

One of the earliest cases in which a similar question was before the courts is *Clements* v. *Runckel*, 34 Mo. 41. In that case the defendant had entered under the pre-emption laws of the United States, and for that reason it was contended that his possession was not sufficiently adverse to cause the statute to run. Judgment in the court below was for defendant, and the Supreme Court, in affirming that judgment, says:

"This was an action of ejectment. The plaintiff showed a clear paper title. The defendant relied upon length of possession under the statute of limitations. The only question presented is upon the character of that possession—whether it was adverse to the plaintiff. There was judgment for the defendant."

"The defendant, and those under whom he claims, did not enter or hold under the plaintiff. They did not recognize his title. They had no privity with him. They do not appear even to have known of the existence of his title. They recognized a title in another person (the United States), who was supposed to be the proprietor, and as to the United States their possession was not hostile; but they did expect to acquire the title of the United States, believing themselves to have a right of pre-emption to the exclusion of all other persons, and a present right to the use and possession of the land.

"The defendant has the actual possession, within the meaning of the statute of limitations, with a claim, not of absolute title it is true, but of a right to acquire the absolute title, which right was adverse to all other persons.

Upon a very similar state of facts, the Supreme Court of Pennsylvania has held such possession adverse to the owner. (*Sweeny* v. *McCullough*, 3 Watts 345; *Jones* v. *Porter*, 3 Penn. 132.)"

The Supreme Court of California, in *Hayes* v. *Martin*, 45 Cal. 560, in holding that the statute would run in favor of a defendant in possession of a Mexican land grant, the survey of which had not been approved, says:

"It is not requisite that a party who relies upon the statute should show that he claims title in hostility to the United States. He may admit title in the United States, either with or without a claim on his part, of the right to acquire the title from

the United States, and it is sufficient if he has such possession as is required by the statute, and claims in hostilty to the title which the plaintiff establishes in the action."

To the same effect as the foregoing are the following California and Texas cases:

McManus v. *O'Sullivan*, 48 Cal. 7.
Page v. *Fowler*, 28 Cal. 611.
Page v. *Fowler*, 37 Cal. 108.
Fanish v. *Coon*, 40 Cal. 57.
Converse v. *Ringer*, 6 Tex. Civ. App., 24 S. W. 705.
Price v. *Eardley* (decided in 1903), 77 S. W. 416.
Village Mills Co. v. *Manley* (decided in 1906), 94 S. W. 102.
Whitaker, et al. v. *Thayer, et al.*, 86 S. W. 364.
Sellers v. *Simpson*, 115 S. W. 888.
Hoencke v. *Lomax*, 118 S. W. 817, 119 S. W. 842.

The Federal Courts have followed the decisions of the Western States on this point. Indeed, the case most similar to the one at bar to be found in any of the reports is *Francoeur* v. *Newhouse*, 43 Fed. 236. In the cases cited above the defendant was in possession under the homestead or pre-emption laws, while in *Francoeur* v. *Newhouse* he claimed under mining locations. The difference, of course, in no way affects the principle. In the latter case the court held distinctly that the defendant was in adverse possession and that the statute ran in his favor, using the following language:

"The testimony all tends to show that these parties held, claiming by their own right, first the mining claims as taken up and conveyed to them under the laws of the United States, and after-

wards under the patent issued in pursuance of those laws of the United States upon such claim. I instruct you that the title for a portion of the time unless granted to the railroad company was in the United States. If it was in the United States, or believed to be in the United States, it does not prevent the operation of the statute of limitations, if the claim was adverse to the Central Pacific Railroad Company. At least, the most that can be said is, that the matter was doubtful as to where the title was, and there was a good foundation for claiming that this was mineral land, and excepted from the grant, so that a party could very well go in there in good faith, buy a claim, located by some one else, and under the laws of the United States continue his possession claiming under that claim, present his claim for a patent to the United States, obtain it, and continue under it in good faith. On that question I will read you a passage from the decision in the case of *Hayes* v. *Martin*, in 45 Cal. 563, which covers the exact ground. 'It is not requisite that the party who relies on the statute should show that he claims his title in hostility to the United States.' These parties did not claim in hostility but went in under the laws of the United States, and finally got a patent. 'He may admit the title in the United States, either with or without a claim on his part or the right to acquire the title from the United States, and it is sufficient if he had such possession as is required by the statute, and claim in hostility to the title which the plaintiff establishes in the action.' Id. And this doctrine was repeated in *McManus* v. *O'Sullivan*, 48 Cal. 15. These parties not only admitted the title of the United States but claimed the right to enter under their laws, and they claimed a patent under those laws and got it. They claim in hostility, as far as the evidence shows, to the title of this complainant. The testimony tends to show that their possession commenced as early as 1882 or 1883 at the latest.

> The testimony also tends to show that the possession was continuous under the claims to a part, with a claim to the whole, according to the boundaries of their deed, down to the commencement of this suit. If you find that to be a fact, the bar of this statute attaches, and you must find a general verdict for the defendant, and a verdict for the defendant under this last special issue submitted to you."

To the same effect is *Northern Pac. R. Co.* v. *Kranich*, 52 Fed. 911. In this case the defendant plead the statute of limitations based upon an entry under the pre-emption laws of the United States. The Court says:

> "Plaintiff filed its motion to strike out this clause in said answer setting up the statutes of limitation, on the ground that the same was inconsistent with the allegations in the sixth clause of the answer, which shows that defendant did not claim said land adversely as against the United States, but under and in subordination to its laws, and acknowledged its title to the same.
>
> "It is admitted that the general rule is that, in order for one to make out a title by adverse possession, the person so claiming must claim title to the premises possessed as against all others. *McCracken* v. *City of San Francisco*, 16 Cal. 591. It is true that the decision is limited in this case to the possession maintained under color of title. But I am unable to find any difference upon this point as to whether a person enters under color of title or without. Perhaps a better way of stating the nature of claim as to title that should be made by one claiming adversely land is that he should claim as owner. The fact that he admits that another is owner, or does not claim title against all others, would generally be insufficient. There is no doubt that in the answer defendant admits ownership of the property in the United

States. Is there any exception as to the general rule I have stated? I think in all of the western states there is an exception thereto. If a party claims title to land here against all persons but the United States, that is sufficient. This view is recognized in the cases of *Francoeur* v. *Newhouse*, 43 Fed. Rep. 236; *Hayes* v. *Martin*, 45 Cal. 563, *McManus* v. *O'Sullivan*, 48 Cal. 15.

"In this state I am satisfied the rule is well established not to allow, as a plea of title in a third party, a plea of title in the United States. For many years no one in Montana held title to real property against the United States. The admission, then, that the title of the property was in the United States was not at all inconsistent with the plea of the statute of limitations by defendant as against plaintiff, and the two defenses are not inconsistent. For these reasons the motion of plaintiff to strike out is overruled."

The principal case cited by counsel for plaintiff against the rule laid down by the above authorities is *Altschul* v. *O'Neil*, 58 Pac. 95, cited in brief of plaintiff in error, p. 51. This is a decision by the Supreme Court of Oregon. The period of limitations in that state is ten years. The suit was commenced in 1898. The defendant had entered into possession of the land in controversy in 1886, believing it to be public land, but made no attempt to acquire right or title until 1894, when he attempted to enter the land as a homestead. The defendant testified that it was his intention, during all the time he was in possession, to get the land from the government. The distinction, therefore, between that case and the one at bar is obvious. In that case defendant was not even rightfully in possession and for years was not even attempting to acquire title. In the present case defendant and its grantors have always been legally in possession, taking such

steps to acquire the property that the government has come to hold the title merely as trustee for it. The case, therefore, clearly falls within the rule announced in *Francoeur* v. *Newhouse*.

Since the decision in *Altschul* v. *O'Neil* the rule it enunciates has been repudiated by the highest court of several states, the Supreme Court of Oregon has overruled it, and the Supreme Court of the United States has announced a contrary rule.

The question came before the Supreme Court of Minnesota in the year 1904, the contention being the same as in the case at bar. That court reviews the various cases on the subject and declines to recognize *Altschul* v. *O'Neil* as authority, using the following language:

> "Counsel for the plaintiff contends, in effect, that under this rule the possession of a disseisor can never be adverse to any one if he enters intending to acquire the title of the United States, it it has the title, as he erroneously believes, because the United States is included in the words 'to the exclusion of all others,' used in stating the rule. The rule is general in its terms, and the construction of it urged seems to be narrow and unreasonable. Statutes of limitations do not operate against the state or general government unless there be an express provision or necessary implication to that effect, and title to public land cannot be acquired by adverse possession. Now, if a person enters upon land, erroneously believing it to belong to the United States, with the intention of acquiring title to the exclusion of all others by his entry and settlement under the homestead law, how can it be reasonably claimed that, because he did not further intend to do that which was a legal impossibility, his possession is not adverse, within the true meaning of the rule? It must be held, upon principle and authority, that the rule

excludes by necessary implication the United States, and that a person may admit its title to the premises, if any it has, and hold them adversely to the exclusion of all others. (Cases cited.) The case of *Altschul* v. *O'Neil*, 35 Or. 202, 58 Pac. 95, which is cited and relied upon by the plaintiff, is opposed to this conclusion. That case reviews the cases we have cited, and seeks to distinguish them, and to show that, upon principle and authority, there is no exception in favor of the United States, and that, to constitute adverse possession, the disseisor must intend to hold in hostility to its title, if any it has. We have attentively considered this decision, and, notwithstanding our great respect for the learned court making it, we are unable to concur in its conclusion. We accordingly answer the controlling question in this case in the affirmative, and hold that a person who takes possession of land in the erroneous belief that it is public land, with the intention of holding and claiming it under the homestead law, may acquire title thereto by adverse possession as against the true owner."

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This question was presented to the Supreme Court of Iowa in 1905, in the case of *Blumer* v. *Iowa R. Land Co.*, 105 N. W. 342, and the case of *Altschul* v. *O'Neil* was relied upon. That court after stating that the claim of one who enters land for the purpose of acquiring title from the government is quite as hostile to all others as though patent had been issued, and that the weight of authority is to the effect that the claim may be subservient to the government if hostile to all others, refers to the case of *Altschul* v. *O'Neil*, as follows:

> "The only decision we have discovered to the contrary is *Altschul* v. *O'Neill*, 35 Or. 202, 58 Pac. 95. But there the company under which plaintiff held became entitled to the land in 1886, and,

though defendant had occupied it since 1866, he had made no effort to acquire the land from the government as a homestead until 1894. His application was then rejected by the officers of the local land office, and their decision later confirmed on appeal. Suit was begun in 1898, and the statute of limitations of 10 years pleaded in bar. It is manifest that defendant was a mere trespasser throughout. His attitude was entirely different from that of a party whose application has been received by the officers of the government, and who has entered into possession in good faith and continues therein in what he supposes to be in conformity with the laws of Congress. Nevertheless, the court delivered an opinion exhibiting extended research to the effect that a claim of right upon which adverse possession may be based must be against the whole world, including the government. No doubt the judges have made all the statements attributed to them in this opinion, but it is to be said in extenuation that each had application to the particular facts of the case in hand, and that in none, save those the court declined to follow, was the question as to whether the fact that the claim was subservient to the government involved. Indeed, the character of the claim under a government entry does not appear to have been given due consideration. If effective, it is exclusive of others. It is an assertion of right to the land, which, if well founded, must defeat the claims of all others. It involves a right of possession as absolute as though the party owned the title. It purports to exclude every one from its enjoyment, and even as against the government to assert the right to divest its title by compliance with the law."

The last cited case was taken to the Supreme Court of the United States in *Iowa Railroad Land Company* v. *Blumer*, 202 U. S. 482, and although this court did

not refer to the case of *Altschul* v. *O'Neil*, it affirmed the decision of the Iowa Court, using the following language:

"After 1891, as we have seen, the railway company was in position to have ousted him from the premises and asserted its superior title and right. It did not attempt to do this, and, so far as the record discloses, made no objection to Carraher planting and cultivating the trees required by the act of Congress to perfect his title under the second application. His possession was certainly open, notorious, continuous, and adverse, and, unless he was acting in bad faith, was such as would ripen into full title as against the railway company, it failing to assert its rights within the period of the statute of limitation. While, until the time had run required by the timber culture act, Carraher would have been in no position to claim title as against the government, he was occupying a hostile attitude toward the railway company, and, while recognizing title in the United States, he expected to acquire title from it, had excluded all others from the use and occupation of the land, and held under no other title. The Supreme Court of Iowa has held that, under such circumstances, the statute of limitations of Iowa would run in his favor as against the railroad company, and we find no reason to disturb that conclusion. And for more than ten years that company was in such position under its grant that it might have maintained an action in ejectment and asserted its title to the premises as against Carraher."

Since the decision of the above cited cases, the Supreme Court of Oregon has refused to follow the rule it laid down in *Altschul* v. *O'Neil*. The question arose in *Boe* v. *Arnold*, 102 Pac. 290, and the decision is in direct conflict with the contention of plaintiff in error in the present case. In overruling *Altschul* v. *O'Neil*, the Court says:

"The authorities supporting the doctrine announced in *Beale* v. *Hite, supra,* and in the cases of *Altschul* v. *O'Neill* and *Altschul* v. *Clark, supra,* are cited and thoroughly commented upon in the opinions in those cases, and it is needless to discuss or cite them here. But we are of the opinion that the weight of authority both in the number of courts and in the reasoning advanced is in favor of the contention of the respondent."

And later it is said:

"The latest decisions of the Supreme Court of the United States rendered in cases having many features similar to the case at bar ought of themselves in our judgment to justify this court in overruling and receding from the doctrine enunciated in *Altschul* v. *O'Neill, Altschul* v. *Clark,* and *Beale* v. *Hite,* so far as they conflict with the views announced. *Missouri Land Co.* v. *Wiese,* 208 U. S. 234; *Missouri Land Co.* v. *Wrich,* 208 U. S. 250; *Iowa R. R. Co.* v. *Blumer,* 206 U. S. 27. In view of the authorities here cited, and especially in the light of the views so lately expressed by the highest tribunal of the nation, we now hold that one claiming title to land by adverse possession for a period of 10 years as against all persons, but recognizing the superior title of the United States government, and seeking in good faith to acquire that title, may assert such adverse possession as against any person claiming to be the owner under a prior grant. Holding these views, we are of the opinion that the judgment of the court below should be affirmed; and it is so ordered."

The case of *Boe* v. *Arnold* contains an exhaustive discussion of the authorities, and is the most instructive case upon the subject, and makes further citation of authority unnecessary.

The case of *Tyree Consolidated Mining Co.* v. *Langstedt,* 136 Fed. 128, is also cited by plaintiff in error.

That decision is avowedly based upon *Altschul* v. *O'Neil*, and since it has been overruled, has necessarily lost its value. Moreover, in that case plaintiff's grantor had derived title by patent from the United States, and the question was solely whether or not the statute of limitations would run in favor of defendant prior to the issuance of the patent. The court re-affirms the doctrine that the statute does not run against the United States, and against its grantee only from the date when he acquires title.

The only other recent case on this subject cited by plaintiff in error is *Hunnewell* v. *Burchett*, 152 Mo. 611.

In that case the defendant was not in possession under any claim whatever. Although believing the land to be public land of the United States, he had made no effort to acquire it by homestead entry or otherwise. He was a mere trespasser with out any claim of right whatever, and in an entirely different position from one who enters and holds land in good faith for the purpose of acquiring the title. Under these circumstances the court correctly decided that the statute would not run.

The non-residence of the owners of the mining claims, or their ownership by a foreign corporation with no designated agent in New Mexico, did not stop the running of the statute of limitations.

The question of the effect upon the defense of limitations of the failure of defendant in error, a foreign corporation, to name an agent in New Mexico was raised by certain paragraphs of replications filed by the plaintiff, shown on pages 13 to 18 of the record. On demurrer these paragraphs were stricken out. This action of the trial court is now assigned as error. Its correctness depends necessarily upon the contention

that the facts plead in these paragraphs of the replication were not sufficient to affect the running of the statute of limitations. The New Mexico statute of limitations as to real estate is found in section 2937 and 2938 of the Compiled Laws, and in Chapter 63 of the laws of 1899. It is unnecessary to discuss the question as to which of these statutes governs the case, as the portions essential to this argument are the same. Each provides a ten-year period of limitation in favor of a person who has held adverse possession of real estate during that time, under certain fixed conditions. No class of persons holding adverse possession is excepted from the operation of the statute. Its protection is open to all, and there is no provision that foreign corporations or non-residents may not take advantage of it. In the Supreme Court of New Mexico counsel for plaintiff in error contended that such an exception was provided in Section 2921 as amended by Chapter 62 of the Laws of 1903, but as no such argument is made in the brief filed in this court, we take it that this contention is abandoned. In any event, the position is wholly untenable for the reason that the section cited applies only to personal actions and does not purport to govern actions for the possession of real estate. It is obvious that there is a necessity for providing that the period of limitation in actions where a personal judgment is sought shall not run while the defendant is beyond the jurisdiction of the court, and no such necessity where the action is for the recovery of the possession of real estate. In personal actions it is impossible to get service on the defendant or obtain judgment during his permanent absence, while if the defendant has brought himself within the protection of the statute limiting actions for the recovery of real estate, he must be in actual possession,

by himself or tenants, and consequently service and judgment are both possible. The action of ejectment may be brought either against the actual claiment or the tenant in possession. (Sec. 3167.) Up to 1893 it apparently could only be brought against the tenant. (Sec. 3162.) The plaintiff and his grantors therefore always had a method for the recovery of the possession of the lands in question, irrespective of whether or not defendant and his predecessors were actually within the Territory.

The argument made in the brief of counsel for defendant in error to the effect that the statute should not run while service upon the defendant cannot be had is therefore inapplicable to the facts of this case, nor are the authorities quoted in point.

A well considered case analagous to the one at bar, and which points out the distinction between real and personal actions in this respect and gives a reason for it, is *City of St. Paul* v. *Railway Co.*, 45 Minn. 387. In that case as in this the argument was advanced that the defendant being a foreign corporation could not have the benefit of the statute of limitations. The court, after a discussion of the Minnesota statutes, proceeds:

> "But we will put our decision on the broader ground that, whether the action be against a corporation or natural person, the exceptions contained in section 15 do not apply to the time limited in section 4, but only to those actions where the time begins to run when the cause of action against the defendant arises. Where land is held adversely there may be twenty successive possessors, each in privity with his predecessors, so that each may tack to the time of his own possession the time of possession of all those preceding him. If an action be brought against any one of the possessors after the first, the time is not to be

counted from his entry—from the time when the plaintiff might have sued him, but from the time of the first entry. That entry, being under claim of title hostile to that of the owner, is a disseisin of the owner, and that disseisin continues so long as the hostile entry and possession is maintained, and if continued for twenty years the remedy of the owner is gone; the adverse holder becomes practically the owner of the land. Land may be adversely held through the tenants or agents of the disseisor. It is not necessary that he should be personally in possession, nor is it necessary that he should be within the state, so that process may be served on him. It is necessary, to constitute adverse possession, that there be at all times some person in an action against whom the real owner may recover the possession of the land. If the disseisor be in possession by tenants or agents, the owner may recover the possession from them, and reinstate his own seisin. From the nature and requisites of adverse possession the owner has always, during the twenty years, a remedy against it, whether he is able to bring an action against the disseisor in person or not. So that absence of the disseisor from the state does not necessarily interrupt the disseisin."

The New York cases cited in the brief of counsel for plaintiff in error, are, as he says, based upon the peculiar wording of the New York statute. Furthermore, no one of them involves the possession of real estate, but are cases of purely personal actions, suits on accounts, for torts, etc. The first case cited in that brief from Nevada, *Robinson* v. *Imperial Co.*, 5 Nev. 44, is based wholly upon the New York decision in *Olcott* v. *Ry. Co.*, 20 N. Y. 221, the Nevada Court simply following that ruling and wholly failing to draw the plain distinction between personal actions and those brought for the possession of real estate. The

cases cited in 10 Nevada avowedly follow the case of *Robinson* v. *Imperial Co.*, not on the ground that these cases were properly decided, but exclusively on the principal of *stare decisis*. The authority of such cases is certainly doubtful.

There is no statute in New Mexico upon which the contention of plaintiff can be based. This being the case, the defendant is confronted with the rule that courts will not insert into the statute of limitations exceptions not provided for by the Legislature unless they arise from an "invincible necessity."

It is to be presumed that the Legislature in passing the law made all the exceptions that it considered necessary.

In the case of *McIvor* v. *Regan*, 2 Wheaton 25, Chief Justice Marshall, speaking for the Court, said:

> "Whenever the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far, for this Court to add to these exceptions. It is admitted, that the case of the plaintiff is not within them, but it is contended to be within the same equity with those which have been taken out of the statute; as where the courts of a county are closed, so that no suits can be instituted. This proposition cannot be admitted. The difficulties under which the plaintiff's labored, respected the trial, not the institution of their suit. There was no obstruction to the bringing of this ejectment at an earier day. * * * If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot, on that account, insert in the statute of limitations, an exception which the statute does not contain. It has never been determined, that the impossibility of bringing a case to a successful issue, from causes of uncertain duration, though

created by the legislature, shall take such cases out of the operation of the act of limitations unless the legislature shall so declare its will."

To the same effect in the case of *Madden* v. *Lancaster County*, 65 Federal 195, in which it is said:

> "But it was the province of the legislature and not that of the courts, to fix the conditions on which the rights of action it created might be enforced, and to name the exceptions to these conditions, if any. The legislature has made no exception, on account of any of the matters to which we have referred, or the express condition that it imposed upon every right of action it created by this act. The conclusive presumption from this fact is that it intended to make none, and it would be judicial legislation for this court to do so."

And see also, to the same general effect, the case of *Lindhauer Mercantile Co.* v. *Boyd*, 70 Pacific 568, in which the Supreme Court of New Mexico, says on page 571, in speaking of exceptions contained in our statute as to limitations in personal actions:

> "There is no ambiguity in the language used in section 2921 of our statutes. The language is in common words, clear and explicit. Whether or not it is a just or wise law, it is not for us to say. It is not for the court to legislate, nor is it for the court to repeal legislative enactments. While the court has the physical power to annul legislative enactments, it has no legal or moral right so to do, and such assumption of authority is thoroughly obnoxious to our form of government and ought never to be indulged in."

In the case of *Amy* v. *Watertown*, 130 U. S. 320, this Court expressly decided that the impossibility of getting service on the defendant would not constitute an exception to the statute. Defendant in that case had

evaded service and by its own actions made service impossible. The Court, after a general discussion of the statute and exceptions to it, says:

"Inability to serve process on a deefndant has never been deemed an excuse for not commencing an action within the prescribed period. The statute of James made no exception to its own operation in cases where the defendant departed out of the realm, and could not be served with process. Hence the courts held that absence from the realm did not prevent the statute from running. *Wilkinson on Limitation*, 40; *Hall* v. *Wyborn*, 1 Shower 98. This difficulty was remedied by the act of 4 and 5 Anne, c. 16, sec. 19, which declares that if any person against whom there shall be any cause of action be at the time such action accrued beyond the seas, that action may be brought against him after his return, within the time limited for bringing such actions. Most of the states have similar acts. The statute of Wisconsin, as we have seen, has a similar provision; perhaps wider in its scope. That statute, therefore, has expressly provided for the case of inability to serve process occasioned by the defendant's absence from the state. It has provided for no other case of inability to make service. If this is an omission, the courts cannot supply it. That is for the legislature to do. Mere effort on the part of the defendant to evade service surely cannot be a valid answer to the statutory bar. The plaintiff must sue out his process and take those steps which the law provides for commencing an action and keeping it alive."

The action in the Court of Private Land Claims did not stop the running of the Statute of Limitations, nor is this action a "continuation' of that proceeding.

As a defense against the statute of limitations, plaintiff in his replication sets up the bringing of the action

in the Court of Private Land Claims, in 1899, for the confirmation of the Leyba Grant. A demurrer to this plea was sustained, and that action of the trial court is now assigned as error.

This contention of plaintiff is based upon section 2925 of the Compiled Laws of New Mexico of 1897, which reads as follows:

> "Section 2925. If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated be deemed a continuation of the first."

This section is compiled from Chapter 5 of the laws of 1880, where it appears as Section 12. In language it limits its effect to "the purposes herein contemplated," necessarily meaning contemplated by the act of which it was a part.

A reading of this act will demonstrate that it applies only to actions on judgments, bonds, accounts, etc., and not to actions for the recovery of real property. Furthermore, Section 16 of that act, now compiled as Section 2930, specifically provides that none of the provisions of the act shall apply to "any action or suit which by any particular statute of this Territory is limited to be commenced within a different time." At the time of the passage of this act, actions for the recovery of real estate were "limited to be commenced at a different time by a particular statute of this Territory," namely by Section 2937 of the Compiled Laws passed prior to 1865. That section provides that a suit to break the running of the statute must be "effectually prosecuted." Certainly an action in which a party is defeated is not "effectually" prosecuted by him.

The argument that the effect of this section was changed by reason of the position in which it appears in the compilation of 1884 is untenable. The compilation of 1884 gives no additional validity or effect to the laws therein contained, is not a new enactment of them, but merely an arrangement of them in one volume. The act under which the compilation was made, which appears on page 82 of the brief of plaintiff in error, demonstrate that this was the effect intended by the Legislature in authorizing the compilation.

Furthermore, the action in the Court of Private Land Claims was not for the purpose of recovering possession of these mining claims. That court had no jurisdiction to give any judgment for possession nor to adjudicate the right of possession as between Sena and the American Turquoise Company. The only question in that case was as to Sena's right to have the grant confirmed as against the United States. Section 13 of the act establishing that court expressly provides that "no proceeding, decree or act under this act shall conclude or affect the private rights of persons as between each other," such controversies being left to the decision of the local courts.

United States v. *Conway*, 175 U. S. 60.

It is confidently asserted that if the defendant in error (plaintiff below) has a complete and perfect title it is because the grant title was complete and perfect, and vested the grantee with full legal title when the grant was made, and any one holding such title might assert the same in the courts of the country, when such assertion became necessary to oust trespassers or adverse holders, and did not require any other recognition than contained in Article VIII of the Treaty of Guadalupe Hidalgo.

This court has never held that, one holding a full and complete title to a grant of land made by either the Spanish or Mexican governments, which was complete and perfect at the date of the Treaty, might not maintain an action of ejectment thereon in the courts of this country, when his possession was invaded by an adverse holder, although the title asserted had received no other recognition than that of the Treaty. It may be true that local courts in New Mexico have declined to recognize such title as a basis for such action, prior to its recognition by the political branch of this government, but this court has never so held, because the Treaty and the Laws of Nations, independent of statutory recognition by this government, guaranteed its full protection and recognition in the courts of the land. If the claimant was content with his title, he might assert it and the laws of Spain and Mexico bearing upon the title, in determining its validity and the estate conveyed thereby, are to be treated as domestic laws. So that, if this grant title was complete and perfect when the country was ceded to the United States, it could have been asserted and the statute of limitations began to run upon the adverse entry and holding by defendants.

Its running was not interrupted by the passage of the Private Land Claims Act. Indeed, the claimant might, so far as the laws apply, have maintained his action for possession in the local courts, and at the same time have maintained his action for confirmation of his title in the Court of Private Land Claims. No statute prohibits and no reason can well be suggested precluding such a course.

The only authority now justifying the plaintiff in the course he pursues is the fact that this court directed the dismissal of his petition for confirmation,

without prejudice to his rights to proceed in the local courts upon the Spanish title which he claims to hold, if he be so advised. Therefore, we contend that if the statute of limitations ever began to run against this title by reason of the entry upon these mining claims, it has not been interrupted nor suspended by any action which the claimant has taken or has neglected to take and we, therefore, contend that his plea against the running of the statute of limitations was without merit and the demurrer to it was properly sustained.

The laches of the claimants of the Leyba Grant, amount to an enquitable estoppel and prevent a recovery by plaintiff in error.

This Court, in passing upon the Leyba Grant in *Sena* v. *U. S.*, *supra*, held that the grant should be refused confirmation on account of the laches of its claimants, stating that the doctrine of laches was peculiarly applicable. There is no difference worthy of notice between the proofs then and now before the court. It is admitted by all parties that the Leyba Grant, excepting the mining claims now in question, for more more than fifty years prior to the commencement of this action were vacant and unoccupied, open to the use of the public generally for grazing and other purposes, with nothing to show that it was anything but public domain and with no sign of private ownership or occupation past or present. No attempt was made to have this grant confirmed by the Surveyor General under the Act of Congress of 1854, although the grant claimants are presumed to have had notice of that act and of their rights thereunder. (*Gildersleeve* v. *New Mexico Mining Co.*, 161 U. S. 573-580.) The public land surveys were extended over the tract in 1861, homestead and other entries were made, improvements

established, patents, secured, mining locations made large and valuable mines developed, and during all this time the Leybas, with an alleged perfect title, made no attempt to assert their rights, and offered no objections.

In 1891 the Court of Private Land Claims was established by an Act of Congress, for the purpose of adjudicating title to lands acquired from the government of Mexico under the Treaty of Guadalupe Hidalgo and Gadsden Purchase, and it was provided that all persons having imperfect titles to land, within the ceded territory, were required to present to that Court for confirmation, their titles thereto within two years from the date of the passage of the Act, otherwise they were to be thereafter deemed forever abandoned and barred.

Those holding perfect titles were permitted to file their claims for confirmation, but, by the Act, were not *bound* to do so. They could decline the permission and stand on the title acquired from the former government. So that it remained for the claimant, or owner of the grant, to determine at his peril, whether or not he would elect to apply for and in the proper cases take confirmation by decree of the Court of Private Land Claims, or stand upon his title. The claimant in this instance did not invoke the jurisdiction of the Land Court until 1899, when he filed his claim in the Court of Private Land Claims, asserting his claim to be a complete and perfect title and asking a decree of that court confirming the same as such. The Court of Private Land Claims, after full trial, held the grant to be imperfect; holding, also, upon the contention made now here, that the possession which plaintiff insists was of such a character that the court should presume his title complete and perfect and all

the requirements fulfilled, was not such a possession as would justify the presumption, and in this court, when the case was heard here on appeal (*Sena* v. *United States, supra*, l. c. 239), it was said by Mr. Justice Brown for the Court:

> "In this connection the court below found that the evidence as to the settlement and occupation of the tract purported to have been conveyed, continuity of possession, cultivation, residence, improvement, claim of ownership, notoriety of the grant, the knowledge of the existence in the community or by the oldest inhabitants now living, is so vague, contradictory and uncertain as to be almost wholly wanting. In the absence of clear evidence to the contrary we deem it our duty to adopt the opinion of the court below in that particular."

As we have repeatedly said, the evidence is no more cogent now in respect of the nature and character of possession than when the case was before the Court of Private Land Claims and subsequently reviewed by this court on appeal.

Claimant and his grantors still remained quiescent and allowed adverse rights to be acquired and extensive improvements to be made, until the fall of 1899, when application for confirmation was finally made. Meanwhile defendant and those under whom it claimed, had entered into the actual possession of portions of the premises, and expended large sums of money and succeeded in developing valuable mines. Their possession was open and notorious. On one of the mines alone over $25,000.00 was spent in development work (R., p. 132). The claimants of the Leyba Grant are presumed to have known of this possession. They made no objection, while the defendant and its grantors made valuable that which before was worth-

less, vacant, unoccupied lands offered to the public as subject to appropriate entry. The mines passed from one purchaser to another for large considerations, was mortgaged and bought in at judicial sale for more than $85,000. R., p. 86.) No one of these parties by the exercise of the utmost diligence could have ascertained that a claim existed that the mines were included in this grant, and there was absolutely nothing to put them upon inquiry as to any such fact.

This Court has held that the plaintiff in error was guilty of such laches as to preclude his obtaining a confirmation of the grant as against the United States. As between the grant claimants and the United States the question of the possession, expenditures and improvements upon the mines now in question was unimportant, but in the present case these additional facts are sufficient to convert the laches of the claimants into an equitable estoppel. The elements necessary for such estoppel, the silence of the grant claimants when they were bound in good faith to disclose their interest, the notoriety of the possession of defendant in error and its predecessors, and of their expenditure of large sums of money in the improvement and development of the mining claims, the presumed knowledge of the grant claimants, are all present. If it be necessary to hold that an equitable estoppel has arisen, the facts on which to base such holding have been fully proven and are undenied.

Indeed, the facts here are very similar to those in *Kirk* v. *Hamilton*, 102 U. S. 68, in which this court held that an equitable estoppel had arisen, the principal difference being that in the case cited the party estopped had actual knowledge of the improvements being made on his land, while in this case such knowledge can be presumed.

And whether the facts submitted in this case prove laches or an equitable estoppel is immaterial to the decision of the present case. In either event they are sufficient to bar a recovery by plaintiff in error.

The rule governing such a state of facts is clearly stated by this court in the case of *Gildersleeve* v. *New Mexico Mining Company*, 161 U. S. 573.

> "The record shows that during twenty-two years, between the passage of the act of 1854 and the issue of the patent in 1876, the collateral heirs remained supinely indifferent to the assertion of their supposed title, while during the greater portion of this time the New Mexico Mining Company was expending labor and incurring the expense connected with the obtaining of the letters patent. So, also, these alleged heirs from the date of the death of Ortiz permitted Mrs. Ortiz, Greiner, and those holding under him, including the mining company, to remain in undisturbed possession of the property and to engage in large outlay for its development without, so far as appears, even claiming rights in themselves, until more than four years had elapsed from the final granting of the patent. * * * There was an uninterrupted use and enjoyment by the widow Ortiz, and those claiming by conveyance from her of the property in question, from the death of Ortiz in 1848; no attempt was ever made to assert rights, if any, of the collateral heirs of Ortiz in this property until the year 1880. They stood by and witnessed the expenditure of large sums of money upon the property and did nothing exhibiting an intention to assert their supposed rights. No attempt was made in the pleading of Gildersleeve to offer any explanation of this long continued acquiescence in the rights of those in possession of the mine and of the privilege connected therewith. Under such circumstances, we think the heirs and those claiming under them are not entitled to equitable relief. Finding at

> the very threshold of the case the existence of such laches on the part of complainant as debars him from obtaining the equitable relief which he invokes, we have not deemed it necessary to express any opinion on the other questions presented by the record."

In the case of *Patterson* v. *Hewitt*, 195 U. S. 309, this court in applying this doctrine to a case involving the claim of an interest in a certain mine, said:

> "There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which today may have no salable value may in a month become worth millions. Years may be spent working such property apparently to no purpose, when suddenly a mass of rich ore may be discovered from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

Upon this question the principal argument in the brief of plaintiff in error is that the laches of plaintiff may not be taken advantage of by the defendant in an ejectment proceeding.

The argument that equitable defenses may not be relied upon in actions of ejectment has been often presented to the courts and in modern times generally repudiated. The general rule is settled in this court in the case of *Kirk* v. *Hamilton*, 102 U. S. 68, which affirmatively holds that the defense of equitable estoppel is effective in such actions. To the same effect are the following cases:

Dickerson v. *Colgrove*, 100 U. S. 578.

Benz v. *Seawall*, 65 Fed. 753.

Tracy v. *Roberts*, 88 Me. 317.
Allen v. *Seawall*, 70 Fed. 564.

But whatever may have been the correct common law rule on this subject, the question in New Mexico is controlled by statute, and express sanction is given to equitable defences in all actions.

Section 6 of Chapter 44 of the laws of 1905 reads in part as follows:

> "That sub-section 175 of Section 2685 of the compiled laws of New Mexico of 1897, be and the same is amended so as to read as follows:
>
> "All statutes in force at the date of the passage of this act, (Section 2685) or enacted since then, or hereafter enacted relating to * * * ejectment * * * shall not be held to be repealed by the enacting of said Section 2685 of the Compiled Laws of 1897, but said Section 2685, and all other statutes relating to said subjects shall be construed together as if all of said laws were enacted at the same time, and shall receive such construction from the court as to harmonize the same as parts of one act, and no repeal shall be held to have been made by implication or conflict, except so far as may be necessary to harmonize the said laws and give effect to them as one uniform system."

It is, then, no longer true that our code does not apply to actions of ejectment. On the contrary the provisions of law governing the special statutory action called ejectment, and the code, are to be construed together and harmonized as parts of one act. The code, Section 2685, now applies to all such special actions, unless there should be a direct conflict, in which event perhaps the special act would govern. Subsection 40 of Section 2685 reads in part as follows:

> "That defendant may set forth by answer as many defences and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both."

Under the act of 1905 this section is to be construed as part of the law governing ejectment, under which plaintiff's action is instituted. It expressly makes equitable defences available, and under it there can be no doubt of the right of defendant in the present case to plead the laches of plaintiff and to rely upon the defense so far as may be necessary.

This provision of our code is found word for word in the parent code of New York, also in Iowa, Missouri and most of the other code states.

It has been frequently construed by various courts, although its language would seem to be plain enough to make construction unnecessary.

In *Dobson* v. *Pearce*, 12 N. Y. 156, which has become a leading case in New York upon the subject, the court says:

> "The Code, Sec. 69, having abolished the distinction between actions at law and suits in equity, and the forms of all such actions as theretofore existing, an equitable defense to a civil action is now as available as a legal defense. The question now is, ought the plaintiff to recover; and anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or legal cognizance."

And in the case of *Chase* v. *Peck*, 21 N. Y. 581, the modern rule applicable to proceedings for the recovery of real estate is broadly laid down as follows:

> "If the present were, therefore, an action of ejectment, prosecuted under the former practice, in which nothing but legal principles could be taken into consideration, then, as the deed from

Aylesworth to Mrs. Howland has been found to be fraudulent, I think, the defendant could not resist the plaintiff's title. But, since the blending of legal and equitable remedies, a different rule must be applied. The defendant can defeat the action upon equitable principles: and if, upon the application of these principles, the plaintiff ought not to be put in possession of the premises, he cannot recover in the action."

In the case of *Chouteau* v. *Gibson*, 67 Mo. 38, an ejectment suit, the Supreme Court of Missouri, says:

"That the defendant Chouteau had the right to interpose an equitable defense to the action of Gibson, and not only prevent a recovery upon establishing such defense, but would be entitled to affirmative relief, if asked, there can be no doubt, for it is expressly provided in the code, that 'a defendant may set forth by answer as many defenses or counter claims as he may have, whether they be such as have heretofore been denominated legal or equitable, or both' ".

The rule is followed by the Supreme Court of Iowa in the case of *Rogers* v. *Gwinn*, 21 Ia. 58, where it is said:

"Our statute allows equitable defenses to be pleaded in actions at law. Rev. Secs. 2617, 2880. Under the answer filed in this case the defendant is entitled to the same relief which the same facts would, under the former practice have authorized if he had made them the ground of a bill in chancery directly assailing the judgment."

The circuitous practice of a bill in chancery to enjoin the law action and for relief is, under the Revision, no longer necessary, if indeed, it be any longer, strictly speaking, proper."

The decisions to this effect are uniform and might be multiplied indefinitely.

These authorities go to the general rule that equitable defenses may be made in ejectment proceedings. Laches being such a defense, no reason is seen why the general rule is not applicable.

Respectfully submitted,

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